

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 79

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
LOCAL 695, A.F.L.; INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL 139, A.F.L., AND  
BUILDING & CONSTRUCTION LABORERS UNION,  
LOCAL 392, A.F.L., PETITIONERS;

vs.

VOGT, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF  
WISCONSIN

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 5, 1956

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## [fol. 1] IN THE SUPREME COURT OF WISCONSIN

## APPENDIX TO APPELLANTS' BRIEF

This is an appeal from a judgment of the Circuit Court of Waukesha County, Honorable Herbert A. Bunde, presiding, entered on the 9th day of November, 1954, granting a permanent injunction against the defendant-appellants and in favor of plaintiff-respondent.

## IN CIRCUIT COURT OF WAUKESHA COUNTY

OPINION—September 15, 1954

It does not appear to have been established by the plaintiffs in either case that the picketing was for an unlawful purpose. True the information being disseminated as a result of the picketing may have caused interference with the business of the plaintiffs, or even loss, but it cannot be said that because of such results the defendants had such intent. It appears without question to this court that the purpose of the picketing was to induce the employees to organize and affiliate with defendant's (sic). If indirectly there were other results it would not be at all surprising but would rather be expected. Unjustly perhaps, there might very well be injury done to other parties than those to the controversy and it might be a possibility for speculation that the reason for the passage of Section 103.535 was to attempt to prevent such injury.

The findings by this court will therefore contain no finding that the picketing was done for an unlawful purpose.

[fol. 2] The question therefore appears to be as to whether or not Section 103.535 is unconstitutional in prohibiting picketing where no labor dispute exists as defined by Wisconsin Statutes; and where the picketing is not for an unlawful purpose.

This court has found that no labor dispute exists in the cases here being considered, as defined by statute.

Constitutionality remains to be determined.

In the Hughes case, referred to in plaintiffs (sic) brief it was stated that picketing is not beyond the control of the State if the manner in which the picketing is conducted

or the purpose it seeks to effectuate gives ground for its disallowance.

It would seem clear as far as this case is authority that there must be something more than simple, peaceful picketing if the picketing is to be enjoined.

The Hanke case can be distinguished from the cases we have here for consideration. There the fact of self employment seems to have been a persuasive factor.

All cases cited recently determined by the U.S. Supreme Court are consistent at least in that they hold that picketing is more than speech. That holding is of course a natural finding as it is common knowledge that picketing is done for other reasons than merely information. It is used for influence, for persuasion and is very likely coercion. [fol. 3] Public policy and the purpose of a legislative program could well be directed to eliminating such acts unless a particular situation defined as a labor dispute existed.

States have a right to determine public policy. The free speech issue as applied to picketing and the rule thereon as stated in the Thornhill case has lost most of its effectiveness by modification thereof in many more recent cases. It probably can be said that it is no longer the law.

This court is mindful of the case of State v. Stehlek, 262 Wis. 642, but irrespective of the good advice given therein, would still hold that the legislature was within its constitutional authority in enacting Section 103.535.

The observations in this opinion are only for the purpose of enlightening counsel in the cases under consideration as to the reasons why this court feels that the injunctions must be continued in force.

Dated September 15, 1954.

By the Court.

Herbert A. Bunde, Circuit Judge.

1 Proof of Service on T. Schneider.

2 Proof of Service on Gilbert Kelly, Vice-President Local 695.

3 Proof of Service on Laborers Union, Local 392—Wife of Leistikow.

[fol. 4] 4-5 Order to Show cause and Temporary Restraining Order.

6 Summons.

IN CIRCUIT COURT OF WAUKESHA COUNTY

COMPLAINT.

Now comes the plaintiff above named, by its attorneys, Lamfrom & Peck, and for and as a cause of action against the above named defendants, alleges and shows to the Court as follows:

1. That the plaintiff now is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

2. That the plaintiff's place of business is located in the Town of Oconomowoc, Waukesha County, State of Wisconsin.

3. That the plaintiff operates in the Town of Oconomowoc, Waukesha County, Wisconsin, a gravel pit, and is engaged in the business of producing and selling washed sand, gravel and ready-mixed concrete, and that said gravel pit and the place of business where it produces and sells washed sand, gravel and ready-mixed concrete is located on a tract of land, approximately 15 acres, more particularly described as follows:

Part of the Southwest quarter (SW  $\frac{1}{4}$ ) of Section 36, Township 8 North of Range 17 East, commencing at the Northeast corner of Lot Forty-three, (43), State Road Addition, thence to pond; thence Northwest along [fol. 5] said pond to the Southwest corner of Bach's and land; thence North  $47^{\circ}$  West 295 feet; thence South west 630 feet; thence South  $45^{\circ}$  West 82.5 feet to the Northwest corner of Lot 25 of said plat; thence 936.5 feet to the place of beginning.

4. That said tract of land borders onto a public road, generally known as Town Road P, and that a private driveway leads from within said tract of land towards and intersects with said Town Road P.

5. The defendant, International Brotherhood of Teamsters, Local 695, AFL, is a labor union having offices and

agents located at 117<sup>1</sup>/<sub>2</sub> Main Street, City of Watertown, Dodge County, State of Wisconsin; that the defendant, International Union of Operating Engineers, Local 139, AFL, is a labor union having offices and agents located at 1029 West Wells Street, City of Milwaukee, State of Wisconsin; and that the defendant, Building & Construction Laborers Union, Local 392, AFL, is a labor union having offices and agents located at 141 Randolph Street, City of Waukesha, Waukesha County, State of Wisconsin.

6. That the plaintiff's investment in equipment and property is in excess of \$150,000.00; and that the plaintiff's gross annual business amounts to approximately \$300,000.00.

7. That the plaintiff, in the past, has been receiving daily, on working days, cement in bulk from the Universal Atlas Cement Company, Milwaukee, Wisconsin, which cement [fol. 6] has heretofore been delivered by trucks of Scherman Trucking Company, Milwaukee, Wisconsin; that the plaintiff has been receiving heretofore steel products from the Joseph T. Ryerson & Son, Inc., Milwaukee, Wisconsin, which steel products have heretofore been delivered to plaintiff's place of business by trucks of the Olson Motor Service, Inc., of Milwaukee, Wisconsin; and that the plaintiff heretofore has been receiving miscellaneous material and supplies, such as paint, tools, lubricants, bolts, cables, etc., which supplies have heretofore been delivered to plaintiff by trucks of the Motor Transport Company, Milwaukee, Wisconsin.

8. That beginning on or about July 13, 1954, and continuously through said day and every day thereafter, to the date of the verification of this complaint, the defendants have caused the plaintiff's place of business aforesaid to be picketed by various individuals walking up and down upon said Town Road P, in front of the plaintiff's private right of way entrance; that said individuals carried and are carrying large signs which are inscribed as follows:

"The men on this job are not 100% affiliated with the A. F. L.

Building & Construction Laborers Union, Local 392.  
Operating Engineers Union, Local 139.  
Teamsters Union, Local 695."

9. That since the commencement of said picketing of plaintiff's premises, a driver of the Schwerman Trucking Company, [fol. 7] intending to deliver cement in bulk, turned away because of said pickets, and the plaintiff, since that time, has been compelled to haul its cement with its own trucks, in bags rather than in bulk, which procedure is more laborious, inefficient, time consuming, and much more expensive, to the damage of the plaintiff.

10. That since the commencement of said picketing of plaintiff's premises, truck drivers of the Motor Transport Company, intending to deliver goods to the plaintiff, turned back three or four times, and more particularly, on or about July 15th and 16th, 1954, and have not since delivered the goods destined for plaintiff.

11. That since the commencement of said picketing of plaintiff's premises, truck drivers of the Olson Motor Service, Inc., have refused to deliver steel products destined for the plaintiff from the Joseph T. Ryerson & Son, Inc.

12. That as a consequence of the several trucking companies' drivers refusing to deliver loads to the plaintiff, the plaintiff, with its own trucks had to haul the goods and supplies heretofore delivered by said trucking companies, resulting in great inconvenience, inefficiency, extra labor and expense, and much damage.

13. That the plaintiff employs approximately 15 to 20 men in its plant and as truck drivers, and that, on information and belief, many of these employees have been contacted by agents of the defendants for the purpose of inducing said employees to join one or more of defendant labor organizations, [fol. 8] and that, on information and belief, none of the plaintiff's employees have joined any of defendant labor organizations; and have indicated to defendant unions' agents that they did not desire to join any of said labor organizations, and, on information and belief, that plaintiff's employees continue to refuse to become members of any of defendant labor organizations.

14. That the picketing of plaintiff's premises has been and is being engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel, or induce its employees to become members of defendant labor organizations, and for the purpose of injuring the plain-

tiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization.

15. That there is no labor dispute of any kind in existence between the plaintiff and any of its employees, and the picketing of plaintiff's premises by the defendants is not because, or by virtue of any labor dispute involving the plaintiff, or any of its employees, and said picketing is in direct violation of the provisions of Section 103.535 of the Wisconsin Statutes (1953), and in addition constitutes a violation of Section 111.06 (2) (b) of the Wisconsin Statutes (1953).

16. That the plaintiff is not engaged in a business involving interstate commerce, and that the plaintiff's business does not affect interstate commerce, in that:

(a) Nearly all of the sand, gravel, ready-mixed cement [fol. 9] produced by the plaintiff is sold and delivered locally in Waukesha, Jefferson, Dodge and Washington Counties, State of Wisconsin, and none of said gravel, sand, and ready-mixed concrete is sold and/or delivered outside of the State of Wisconsin;

(b) None of said sand, gravel and ready-mixed concrete is destined for ultimate out-of-state shipment, and said materials do not in fact reach localities outside of the State of Wisconsin;

(c) Only an insignificant amount of plaintiff's sales, to-wit, less than \$2,000.00 per year, of the material produced and sold by plaintiff are furnished to firms or individuals engaged in interstate commerce, and that none of such material ultimately goes outside the State of Wisconsin;

(d) Plaintiff does not receive materials and supplies directly from outside the State of Wisconsin; and

(e) Plaintiff does not furnish materials and supplies to establishments directly affecting the National Defense.

17. That the plaintiff is suffering irreparable damage, and has no adequate remedy at law, and that plaintiff will continue to suffer irreparable damage unless defendants are immediately enjoined and restrained from engaging in and

from continuing to engage in the illegal acts heretofore complained of.

Wherefore, Plaintiff demands judgment that the defend-  
[fol. 10] ants, and each of them, their employees, servants,  
agents, confederates, associates, and all of the officers and  
members of said defendant labor organizations, during the  
pendency of this action, and thereafter, be perpetually en-  
joined and restrained:

(a) From directly or indirectly establishing and maintaining, or causing to be established or maintained, any pickets or patrols in front of plaintiff's entrance ways, driveways, on private and public roads leading to plaintiff's business establishment, and generally at or near plaintiff's establishment located in the Town of Oconomowoc, Waukesha County, State of Wisconsin;

(b) From displaying or causing to be displayed any signs or placards anywhere at or near plaintiff's business establishment or on the roads and highways leading thereto;

(c) From inducing or persuading, or causing others to induce or persuade trucking, cartage, and other transportation companies and their officers, agents and employees to decline to deliver, haul or transport goods and supplies to and from the plaintiff's business establishment;

and that the plaintiff have such other and further relief as to the Court may seem just and equitable.

Lamfrom & Peck, Attorneys for Plaintiff. Hilbert W.  
Dahms, Of Counsel.

Verification by Frederick Vogt.

[fol. 11] IN THE CIRCUIT COURT OF WAUKESHA COUNTY

AFFIDAVIT OF FRED OXENDORF

STATE OF WISCONSIN,  
Waukesha County, ss.

Fred Oxendorf, being first duly sworn, on oath, deposes and says that since 1946 he has been and still is an employee of the plaintiff, Vogt, Inc., operating for such employer a ready-mixed concrete truck and, generally, delivering concrete and cement.

That he is 41 years of age, married, and resides at 1274 Lake Drive, Town of Okauchee, Waukesha County, Wisconsin.

That on or about the first week of April, 1954, he delivered a truck load of ready-mixed concrete to the Self Service Laundry, in the Village of Hartland, Waukesha County, Wisconsin; that at that time he was approached by two men who revealed themselves as agents for the Teamsters Union, and that he was asked about joining the union, and his membership in said union was solicited; and that to all of this he replied to said union agents that he was satisfied about his present state of employment, that he did not even think about a union, and, generally, indicated that he did not desire to join the union.

Fred Oxendorf.

Subscribed and sworn to before me this 28th day of July, 1954.

Hilbert W. Dahms, Notary Public, Waukesha Co.,  
Wis.

My commission expires: Aug. 29, 1954.

[fol. 12] IN THE CIRCUIT COURT OF WAUKESHA COUNTY

AFFIDAVIT OF LEE LINSE

STATE OF WISCONSIN,  
Waukesha County, ss.

Lee Linse, being first duly sworn, on oath deposes and says that he is now, and for the past two years has been, an

employee of the plaintiff, Vogt, Inc., engaged in operating a ready-mixed concrete truck for said employer.

That he is 21 years of age, married and resides in the Town of Sullivan, Jefferson County, State of Wisconsin.

That in the Fall of 1953, while parking in the center of the main street of the Town of Delafield, Waukesha County, State of Wisconsin, near the monument, his truck having broken down, he was approached by two or three men who identified themselves as agents of the Teamsters Union, and that they questioned him as to why he did not join the Teamsters Union, to which question he replied that he was satisfied with his present working conditions.

That he has since said time been followed several times while operating one of plaintiff's ready-mixed concrete trucks on the public highways, by individuals who appeared to be agents or organizers of the Teamsters Union, and that one such occasion was when he recently drove to the [fol. 13] Town of Greenbush:

Lee Linse.

Subscribed and sworn to before me this 28th day of July, 1954.

Hilbert W. Dahms, Notary Public, Waukesha Co.,  
Wis.

My comm. expires: Aug. 29, 1954.

# IN THE CIRCUIT COURT OF WAUKESHA COUNTY

## AFFIDAVIT OF GEORGE BRANDT

STATE OF WISCONSIN,  
Waukesha County, ss.

George Brandt, being first duly sworn, on oath, deposes and says that for several years past, and since 1951, he has been an employee of the plaintiff, Vogt, Inc.; that he is 31 years of age, and that he resides in the Town of Concord, Jefferson County, State of Wisconsin, and that his post office address is Route No. 1, Helenville, Wisconsin.

That while in the employ of the plaintiff, and while operating a ready-mixed concrete truck, he was, at three sep-

arate times followed by agents of the defendant Teamsters Union, which agents followed him to a point at or near the place to which his load of ready-mixed cement was to be delivered.

That on or about April 5, 1954, he was followed by an agent of said Teamsters Union from the City of Oconomowoc, Wisconsin, to a point at or near the sub-station of the Wisconsin Electric Power Company located in the Town of Ixonia, Jefferson County, State of Wisconsin, at which point said union agent accosted him and spoke to him as hereinafter indicated; and that on or about August 10, 1953, he was stopped on the highway while returning from a ready-mixed concrete delivery made to the farm of Francis J. Trecker, located on the West Shore of Pine Lake, Waukesha County, Wisconsin, and was there, too, talked to by the agents of the Teamsters' Union. said agents ter indicated.

That on the occasions when he was thus accosted and talked to by the agents of the Teamsters' Union, said agents attempted to solicit him for membership in the Union, and told him of the alleged advantages of joining such union, and inquired as to the wages, hours and working conditions at plaintiff's place of business, to all of which affiant replied that he did not want to join the union, and that he was happy in his present state of employment.

That said union agents indicated they represented a local of the Truck Drivers' Union from Waukesha.

George Brandt.

Subscribed and sworn to before me this 28th day of July, 1954.

Hilbert W. Dahms, Notary Public, Waukesha County,  
Wisconsin.

(N.S.)

My Commission Expires Aug. 29, 1954.

[fol. 15] IN THE CIRCUIT COURT OF WAUKESHA COUNTY

AFFIDAVIT OF EARL EPPLER

STATE OF WISCONSIN,  
Waukesha County, ss.

Earl Eppler, being first duly sworn, on oath deposes and says that since May 1, 1953, he has been an employee of the plaintiff, Vogt, Inc.; that he is 24 years of age and that he resides in the Town of Ixonia, Jefferson County, State of Wisconsin, and that his post office address is Route No. 3, Oconomowoc, Wisconsin.

That on or about April 1, 1954, while in the employ of the plaintiff, and while operating a truck and making delivery of a load of sand on Roland Street in the City of Oconomowoc, Waukesha County, Wisconsin, he was accosted by a labor union representative who showed affiant his card and wanted to know what affiant thought of joining a union; he also questioned affiant concerning his wages and working conditions; pointing out alleged benefits and advantages of union membership, and representing that employees of other general contractors in the vicinity of Oconomowoc employed union labor; that affiant replied that he didn't care whether Vogt, Inc., was union or not and that he was satisfied with his employment conditions.

Earl D. Eppler.

Subscribed and sworn to before me this 28th day of July, 1954.

(N. S.), Hilbert W. Dahlms, Notary Public, Waukesha County, Wisconsin.

My Commission Expires Aug. 29, 1954.

[fol. 16] 17 Cover.

18 Affidavit of Prejudice.

19 Cover.

20 Order of Appointment.

## IN CIRCUIT COURT OF WAUKESHA COUNTY

## ANSWER

Now come the above named defendants, International Brotherhood of Teamsters, Local 695, AFL; International Union of Operating Engineers, Local 139, AFL; and Building & Construction Laborers Union, Local 392, AFL, by their attorneys, and for an answer to the complaint of the plaintiff admit, deny, qualify, and allege as follows:

1. Admit the allegations of paragraph 1, 2, 3, 4, and 5 of said complaint.

2. Deny any knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 6 of said complaint, and put plaintiff to its proof.

3. Deny any knowledge or information sufficient to form a belief as to the allegations set forth in paragraph 7 of the complaint, and put plaintiff to its proof.

4. Admit the allegations of paragraph 8.

5. Deny any knowledge or information sufficient to form [fol. 17] a belief as to the allegations set forth in paragraphs 9, 10 and 11, and put plaintiff to its proof.

6. Deny any knowledge or information sufficient to form a belief as to the allegations of paragraph 12.

7. Admit so much of the allegations of paragraph 13 alleged that agents of the defendants have contacted plaintiff's employees and that none of plaintiff's employees have joined any of the defendant labor organizations; but deny any knowledge or information sufficient to form a belief as to the desires of the plaintiff's employees to join any of said labor organizations.

8. Deny that the picketing of plaintiff's premises has been, or is being engaged in, for the purpose of coercing, intimidating and inducing the employer to force, compel or induce its employees to become members of defendant labor organizations; further deny that the picketing of plaintiff's premises has been, or is being engaged in, for the purpose of injuring the plaintiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization.

9. Deny that there is no labor dispute between the defendants and the plaintiff's employees; further deny that the

picketing herein is in any way in violation of the provisions of Section 103.535 of the Wisconsin Statutes; further deny that said picketing constitutes a violation of Section 111.06 (2) (b) of the Wisconsin Statutes.

10. Deny any knowledge or information sufficient to form [fol. 18] a belief as to the allegations set forth in paragraph 16 of the complaint, and put plaintiff to its proof.

11. Deny that the plaintiff is suffering irreparable damage or that plaintiff has no adequate remedy at law or that plaintiff will continue to suffer irreparable damage unless defendants are immediately enjoined and restrained from engaging in or from continuing to picket.

## IN CIRCUIT COURT OF WAUKESHA COUNTY

### AFFIRMATIVE DEFENSES

1. As and for an affirmative defense, defendants allege that the plaintiff hires employees who work at crafts represented by defendant unions, and that none of these employees are members of the defendant unions, or any union affiliated with the American Federation of Labor, and further allege on information and belief that plaintiff's employees work under wages, hours and working conditions which are inferior to those of the aforesaid craft union, and the performance of work under such conditions has an adverse effect upon the working conditions of the aforesaid craft unions; and that there exists a labor dispute between the defendant unions and all persons working at said crafts in any capacity who are not members of the defendant unions or of any union affiliated with the American Federation of Labor, and who work under conditions which are different from and inferior to those enjoyed by the members of such craft unions.

That even though plaintiff's employees may be working presently under conditions which are equivalent to the conditions under which members of the aforesaid craft [fol. 19] unions work, there, nevertheless, exists a labor dispute between such plaintiff's employees and the defendant unions in that although plaintiff's employees may be presently employed under comparable working condi-

ditions, defendant unions have no assurance that such equivalent working conditions will continue in the future, and the only recourse open to the defendant union to assure the continuance of such conditions is that they induce all employees working at the aforesaid crafts to become members of such craft unions or any other union affiliated with the American Federation of Labor.

That these answering defendants further allege that any and all activities engaged in by the defendants are for a lawful purpose and carried on by lawful means; that said activities are protected under the First and Fourteenth Amendments to the United States Constitution, and similar provisions of the Constitution of the State of Wisconsin, in that said activities constitute an exercise of freedom of speech and of the press, and that if these defendants are restrained from engaging in said activities, such restraint will be in violation of said constitutional provisions, and for the further reason that said restraint would deprive the defendants of privileges and immunities of citizens of the United States, and would deprive them of life, liberty, and property without due process of law and would deprive them of the equal protection of the laws; defendants further allege that if the Statutes of the State of Wisconsin are construed to apply to the activities of the defendants herein so as to prohibit said activities, then said Sections of the Wisconsin Statutes are unconstitutional in that they violate [fol. 20] the First and Fourteenth Amendments to the United States Constitution and similar provisions of the Wisconsin Constitution.

2. As and for a further affirmative defense, these defendants allege that this court does not have jurisdiction over the subject matter or the parties to this action pursuant to Sections 103.56 and 133.07 of the Wisconsin Statutes, in that the controversy set forth in the complaint is one which grows out of and arises out of a labor dispute as defined in Section 103.62.

3. As and for a further affirmative defense, defendants allege that plaintiff has an adequate remedy at law pursuant to Chapter 111 of the Wisconsin Statutes, jurisdiction over which is vested in the Wisconsin Employment Relations Board.

4. As and for a further affirmative defense, defendants allege that the activities in which they are engaged are protected under Section 103.53 of the Wisconsin Statutes.

Wherefore, these answering defendants pray for judgment dismissing the plaintiff's complaint, together with the costs and disbursements of this action, and for such other relief as under the circumstances may be deemed just and equitable.

Padway, Goldberg & Previant, Attorneys for Defendants, International Brotherhood of Teamsters, Local 695, AFL; International Union of Operating Engineers, Local 139, AFL, and Building and Construction Laborers Union, Local 392, AFL.

[Fol. 21] 26. Verification by Alois S. Mueller.

27. Verification by Milton MacDonald.

28. Cover.

34-35. Plaintiff's Injunction Bond.

36. Verification of Hilbert W. Dahms.

37. Insurance Form.

38. Cover.

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#### IN CIRCUIT COURT OF WAUKESHA COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW—November 9,  
1954

The order to show cause of the plaintiff why a temporary injunction should not be issued as prayed for in the complaint, having come before the above Court on the 19th day of August, 1954, at the regular February Term of this Court, before the Honorable Herbert A. Bunde, Circuit Judge, Lamfrom & Peck appearing as attorneys for the plaintiff, and Hilbert W. Dahms of counsel, and all of the defendants appearing by Padway, Goldberg & Previant, by Albert J. Goldberg and David L. Uelmen, and after considering the allegations in the complaint and the affidavits attached thereto, and the allegations in the answer, and after hearing the arguments and considering the briefs of counsel, and being sufficiently advised in the premises, I

hereby make and file the following Findings of Fact and Conclusions of Law, to-wit:

[fol. 22]

### Findings of Fact

1. That the facts as alleged in paragraphs 1, 2, 3, 4, 5 and 8 of the complaint, admitted in the defendants' answer, are true and correct, and that picketing referred to in paragraph 8 of the complaint continued up to the time the temporary restraining order, issued by the Honorable Allen D. Young, Judge of the Circuit Court of Waukesha County on the 29th day of July, 1954, was served upon the defendants.

2. That the drivers of several trucking companies have refused to deliver and haul goods and materials to and from plaintiff's premises as a result and in consequence of defendants' picketing of the plaintiff's premises, resulting in great inefficiency, inconvenience, extra labor and expense, and much damage to plaintiff.

3. That the facts as alleged in paragraph 13 of the complaint, admitted in paragraph 7 of the defendants' answer, are true and correct, and, further, that plaintiff's employees do not desire to join defendant labor organizations and continue to refuse to become members of such labor organizations.

4. That the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's (sic).

5. That no labor dispute or controversy has been or is in existence between the plaintiff and any of its employees, or between the plaintiff and the defendants, concerning the [fol. 23] right or process or details of collective bargaining, or concerning the designation of bargaining representatives, and that the picketing of the plaintiff's premises by the defendants was not undertaken because of any such labor dispute or controversy, as defined in Sec. 103.62 (3), Wis. Stats.

[fol. 23] 6. That the facts as alleged in paragraph 16 of the Complaint are true and correct.

And I find as

## CONCLUSIONS OF LAW

1. That there was and is no labor dispute in existence between the plaintiff and its employees, or between the plaintiff and the defendants.

2. That Sec. 103.535, Wis. Stats., is controlling since no labor dispute exists, as that term is defined in Sec. 103.62(3), Wis. Stats., and that the defendants' conduct was and is unlawful by reason of Sec. 103.535, Wis. Stats.

3. That Sec. 103.535, Wis. Stats., is a valid and constitutional enactment and does not violate the First and Fourteenth Amendments to the Constitution of the United States, and the similar provisions of the Constitution of Wisconsin, and is a valid exercise of the police power of the State of Wisconsin.

4. That this Court does have jurisdiction over the subject matter and the parties and that this case is not one involving or growing out of a labor dispute, as defined in Sec. 103.62 (3), Wis. Stats.

[fol. 24] 5. That the plaintiff has suffered, and continuation of defendants' conduct would further cause it to suffer, irreparable damage; and that the plaintiff has no adequate remedy at law.

6. That the plaintiff is not engaged in a business involving or affecting interstate commerce.

7. That the named defendants, and each of them, their employees, servants, agents, confederates, associates, and all of the officers and members of said defendant labor organizations, during the pendency of this action, and thereafter, be enjoined and restrained:

8. That the named defendants, and each of them, their employees, servants, agents, agents, confederates, associates, and all of the officers and members of said defendant labor organizations, during the pendency of this action, and thereafter be enjoined and restrained:

(a) From directly or indirectly establishing and maintaining, or causing to be established or maintained, any pickets or patrols in front of plaintiff's entrance ways, driveways, on private and public roads leading to plaintiff's business establishment, and generally at or near plaintiff's establishment located in the Town of Oconomowoc, Waukesha County, State of Wisconsin.

(b) From displaying or causing to be displayed, anywhere at or near plaintiff's business establishment or on the roads and highways leading thereto, any signs [fol.25] or placards bearing the legend or legends as described in the Complaint herein, or stating or intending to cause to be understood that there is a labor dispute in existence between the plaintiff and its employees, or between the plaintiff and any of the defendants.

(c) From inducing or persuading, or causing others to induce or persuade trucking, cartage and other transportation companies and their officers, agents and employees to decline to deliver, haul or transport goods and supplies to and from the plaintiff's business establishment.

Let an order be entered and a temporary injunction, as demanded in the Order to Show Cause, except as otherwise provided in the Findings of Fact and Conclusions of Law herein, issue accordingly.

Dated at Wisconsin Rapids, Wisconsin, this 9th day of November, 1954.

By the Court: (S.) Herbert A. Bunde, Circuit Judge.

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[fol.26] IN CIRCUIT COURT OF WAUKESHA COUNTY

JUDGMENT AND ORDER FOR PERMANENT INJUNCTION—

November 9, 1954

On reading the verified complaint of the plaintiff and the affidavits attached thereto in support of the motion, and the verified answer of the defendants in opposition thereto; and after hearing the arguments of counsel, Lamfrom & Peck, attorneys, and Hilbert W. Dahms, of counsel, for the plaintiff, and Padway, Goldberg & Previant, by Albert J. Goldberg and David L. Uelman, attorneys for the defendants, respectively, in support of and in opposition to the motion; and after considering the briefs of counsel, this Court having thereupon issued its decision on September 15, 1954; and after having made and filed its Findings of

Fact and Conclusions of Law, from which it satisfactorily appears, and wherein the Court finds, that the plaintiff is entitled to the relief prayed for, viz., an order and injunction as hereinafter set forth; and the plaintiff having heretofore given an undertaking in the sum of Five Hundred Dollars (\$500.00), which has been duly approved; and upon stipulation by and between the parties, hereto annexed;

It Is Hereby Ordered and Adjudged that the above named defendants, and each of them, their employees, servants, agents, confederates, associates, and all of the officers and members of said defendant labor organizations, be perpetually enjoined and restrained:

(a) From directly or indirectly establishing and maintaining, or causing to be established or maintained, any pickets or patrols in front of plaintiff's entrance ways, driveways, on private and public roads leading to plaintiffs' business establishment, and generally at or near plaintiff's establishment located in the Town of Oconomowoc, Waukesha County, State of Wisconsin.

(b) From displaying or causing to be displayed, anywhere at or near plaintiff's business establishment or on the roads and highways leading thereto, any signs or placards bearing the legend or legends as described in the complaint herein, or stating or intending to cause to be understood that there is a labor dispute in existence between the plaintiff and its employees, or between the plaintiff and any of the defendants.

(c) From inducing or persuading, or causing others to induce or persuade, trucking, cartage and other transportation companies and their officers, agents and employees to decline to deliver, haul or transport goods and supplies to and from the plaintiff's business establishment.

And, It Is Hereby Further Ordered that the undertaking heretofore given by the plaintiff be and the same is hereby cancelled and discharged.

Dated this 9th day of November, 1954, at Wisconsin Rapids, Wisconsin.

By the Court, (S.) Herbert A. Bunde, Circuit Judge.

[fol. 28] IN CIRCUIT COURT OF WAUKESHA COUNTY

STIPULATION OF SETTLED RECORD—November 8, 1954

It Is Hereby Stipulated and Agreed by and between the plaintiff and the defendants in the above entitled action, through their respective attorneys, that, inasmuch as the record herein contains all of the facts and evidence that would be adduced upon a trial on the merits of the issues herein, the Court may consider such record as the record upon which the Court may enter such order and final judgment as the Court may deem proper.

Dated: November 8th, 1954.

Lamfrom & Peck, by J. A. Bernheim, (S) Attorneys  
for Plaintiff. Padway, Goldberg & Previant, by  
Albert J. Goldberg, (S.) Attorneys for Defendants.

48 Admission of Service.

50 Notice of Entry of Judgment.

[fol. 29] IN CIRCUIT COURT OF WAUKESHA COUNTY

NOTICE OF APPEAL—December 10, 1954

To Lamfrom and Peck,  
Attorneys for Plaintiff,

Samuel D. Connell,  
Clerk of the Circuit Court  
for Waukesha County.

Please Take Notice that the defendants above named hereby appeal to the Supreme Court of the State of Wisconsin from the Judgment entered by the above named Court herein, entered on the 19th day of November, 1954, in favor of the plaintiff and against the defendants, and from the whole thereof.

Dated at Milwaukee, Wisconsin, this 10th day of December, 1954.

Padway, Goldberg & Previant, Attorneys for Defendants.

53 Appeal Bond.

[fol. 30] Argument and submission—May 31, 1955 (omitted in printing).

[fol. 31] IN SUPREME COURT OF WISCONSIN

Waukesha Circuit Court

VOGT, Incorporated, a Wisconsin corporation, Respondent

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695,  
AFL, International Union of Operating Engineers, Local  
139, AFL, and Building & Construction Laborers Union,  
Local 392, AFL., Appellants

JUDGMENT—June 28, 1955

This cause came on to be heard on appeal from the judgment of the Circuit Court of Waukesha County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Waukesha County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to dissolve the injunction and dismiss the complaint.

[fol. 32] IN SUPREME COURT OF WISCONSIN, AUGUST TERM,  
1954

No. 285

Vogt, Incorporated, a Wisconsin corporation, Respondent

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Local 693,  
AFL, International Union of Operating Engineers, Local  
139, AF, and Building & Construction Laborers Union,  
Local 392, AFL., Appellants

OPINION

Appeal from a judgment of the circuit court for Waukesha County, HERBERT A. BUNDE, circuit judge. *Reversed and remanded.*

In 1954 plaintiff operated a gravel pit in the town of Oconomowoc, Waukesha County. It was engaged in the business of producing and selling washed sand and gravel and ready-mixed concrete. For the operation of its business it received by truck cement, steel products and other materials. On July 13, 1954 the defendant unions stationed pickets at the entrance to plaintiff's property on a town road upon which plaintiff's property abuts. The location was not frequented by the general public. The pickets carried signs reading:

"The men on this job are not 100% affiliated with the A.F.L.

Building & Construction Laborers Union, Local 392  
Operating Engineers Union, Local 139  
Teamsters Union Local 695"

Because of the picketing some of the truck drivers who had been hauling materials to plaintiff's plant refused to cross the picket line to deliver materials. Plaintiff's em-[fol. 33] ployees had been solicited to join defendant unions but had refused and had indicated that they did not desire to join. No labor dispute or controversy of any kind ex-

isted. None of the members of the defendant unions were in plaintiff's employ. The trial court found as follows:

"2. That the drivers of several trucking companies have refused to deliver and haul goods and materials to and from plaintiff's premises as a result and in consequence of defendant's picketing of the plaintiff's premises, resulting in great inefficiency, inconvenience, extra labor and expense, and much damage to plaintiff.

"3. That the facts as alleged in paragraph 13 of the complaint, admitted in paragraph 7 of the defendants' answer, are true and correct, and further, that the plaintiff's employees do not desire to join defendant labor organizations and continue to refuse to become members of such labor organizations.

"4. That the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's (sic).

"5. That no labor dispute or controversy has been or is in existence between the plaintiff and any of its employees, or between the plaintiff and the defendants, concerning the right or process or details of collective bargaining, or concerning the designation of bargaining representatives, and that the picketing of the plaintiff's premises by the defendants was not undertaken because of any such labor dispute or controversy, as defined in Sec. 103.62(3), Wis. Stats."

Upon appropriate conclusions of law judgment was entered on November 9, 1954 permanently restraining defendants from picketing at the premises. Defendants appeal.

[fol. 34] GEHL, J. In a memorandum opinion filed by the trial judge he stated his conclusion that the picketing had not been conducted for an unlawful purpose, but that it constituted a violation of section 103.535 Stats. which provides as follows:

"Unlawful conduct in labor controversies. It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employes, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any

person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employees or their representatives."

Sec. 103.62 Stats. provides:

"\* \* \*

"(3) The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

The question whether picketing as it is described in these statutes, but otherwise lawful, may be enjoined, has not been squarely presented to this court. Counsel for defendants contend that if sec. 103.535 is to be construed as authorizing such action it is invalid as depriving defendants of the right of free speech in violation of the federal and the state constitutions. We have held that if the picketing is conducted in violation of section 111.06(2)(a) or 111.06(2)(b) Statutes it is done for an unlawful purpose and may be enjoined. *Retail Clerks' Union v. Wisconsin E. R. Board*, 242 Wis. 21, 6 N. W. (2d) 698; *Christoffel v. Wisconsin E. R. Board*, 243 Wis. 332, 10 N. W. (2d) 197; *Wisconsin E. R. Board v. Retail Clerks Int. Union*, 244 Wis. [fol. 35] 189, 58 N. W. (2d) 655. The United States Supreme Court has also recognized that picketing if conducted for an unlawful purpose may be prohibited by state statute. *Building Service Union v. Gazzam*, 339 U. S. 532.

Sec. 111.06(2) provides that it shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his

domicile, or injure the person or property of such employee or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative."

Counsel for plaintiff contend that the picketing was conducted in violation of these provisions and therefore for an unlawful purpose. The trial judge did not find facts which would have supported a conclusion that either subdivision had been violated; he went no further than to find "that the purpose of the picketing was to induce the employees to organize and affiliate with defendant's"; (sic) and rejected a finding requested by the plaintiff as follows:

"4. That the picketing of plaintiff's premises has been engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel, or induce its employees to become members of defendant labor organizations, and for the purpose of injuring the plaintiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization."

The testimony would not have supported a finding of the facts constituting a violation of either of the subsections. No threats were made against the plaintiff; no demands were made upon it. It does not appear that any of the defendants' representatives had even spoken to plaintiff's officers about their desire to organize its employees. There was no violence, no force and no threat of force, no disorder or physical obstruction to plaintiff's property. There was no evidence that defendants' representatives [fol. 36] had coerced or intimidated any of plaintiff's employees in their right to join or refuse to join either of defendant unions. There was only peaceful persuasion exercised by the carrying of a banner bearing a truthful legend.

Having concluded that the picketing was not conducted

for an unlawful purpose we reach the question as it was stated in *American Federation of Labor v. Swing*, 312 U. S. 321, 85 L. Ed. 855:

“Is the constitutional guaranty of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?”

The question was answered by the court in the affirmative. In that case the union had unsuccessfully tried to unionize Swing's beauty parlor. Picketing followed. Suit was brought by Swing and his employees to enjoin the interference with the former's business. The United States Supreme Court considered that a permanent injunction granted by the state court rested on the latter's conclusion that there had been no more than “peaceful persuasion”. The court said:

“We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no ‘peaceful picketing or peaceful persuasion’ in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

“Such a ban of free communication is inconsistent with the guaranty of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become

[fol. 37] a commonplace. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209, 66 L. ed. 189, 199, 42 S. Ct. 72, 27 ALR 360. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

The ruling in the *Swing Case* was followed in *Bakery Drivers Local v. Wohl*, 315 U. S. 769 and *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, and recognized by this court as being binding on us in *Wis. E. R. Board v. International Asso., etc.*, 241 Wis. 286, 6 N. W. (2d) 339.

These cases must be accepted as stating the settled law that a state may not constitutionally prohibit the exercise of free speech by picketing by narrowing the field of a labor dispute to include only the relationship between an employer and his employees.

Four decisions of the United States Supreme Court are cited by plaintiff as authority for its assertion that the doctrine of the *Swing* and *Wohl* cases has been limited by that court:

*Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490;

*Hughes v. Superior Court*, 339 U. S. 460;

*Building Service Employees v. Gazzam*, 339 U. S. 532;

*International Brotherhood of Teamsters v. Ranke*, 339 U. S. 470;

*Local Union No. 10 v. Gephart*, 345 U. S. 192."

We do not so construe them. In each of them the right of the state to enjoin picketing under the circumstances existing was recognized. They, as well as others resulting in similar holdings, have been examined by us. It would serve no useful purpose to discuss each of them and to point out in what respect it is to be distinguished in its facts from those appearing in the instant case. It is enough to say that in each of them there were circumstances which the court said demonstrated a purpose on the part of the pickets to accomplish an unlawful purpose, in most of them [fol. 38] more than a mere effort peacefully to persuade the employees by the use of a banner to join the interested union.

By the Court: Judgment reversed, and cause remanded with directions to dissolve the injunction and dismiss the complaint.

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[fols. 39-40] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed July 18, 1955

And now comes the Respondent, and moved that the Court grant a rehearing, upon argument to be set forth in a brief which will be served and filed pursuant to the rules of this Court, on the Decision and Judgment of this Court entered and filed on the 28th day of June, 1955, reversing the Judgment of the Circuit Court for Waukesha County.

Dated this 15th day of July, 1955.

Lamfrom & Peck, Attorneys for Respondent.

Leon B. Lamfrom, Jacob L. Bernheim, Hilbert W. Dahms, of Oconomowoc, Wis., of Counsel.

[File endorsement omitted.]

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[fol. 41] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER RETAINING RECORD—July 18, 1955

The said respondent having moved for a rehearing in this cause, it is now here ordered that the record be retained in this Court until the final determination of said motion.

[fol. 42] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER GRANTING MOTION FOR REHEARING ON QUESTIONS  
SUBMITTED—October 5, 1955

The Court being now sufficiently advised of and concerning the motion of the said respondent for a rehearing in this cause, it is now here ordered that said motion for rehearing, be, and the same is hereby, granted. Cause to be reargued on questions submitted, on the December assignment, as follows:

(1) Would the facts disclosed by the record and the permissible inferences support a finding that section 111.06(2)(b) has been violated, and

(2) If the answer to the above is in the affirmative may this court, in view of what is found in the Maine case make the finding?

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[fol. 43] Reargument and submission—January 12, 1956  
(omitted in printing).

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[fol. 44] IN SUPREME COURT OF WISCONSIN

VOGT, INCORPORATED, a Wisconsin Corporation, Respondent

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695  
AFL, International Union of Operating Engineers, Local  
139, AFL, and Building & Construction Laborers Union.  
Local 392, AFL, Appellants

JUDGMENT—February 7, 1956

This cause came on to be heard on the reargument heretofore ordered herein and was reargued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the original mandate filed herein on

June 28th, 1955, be, and the same is hereby, vacated, and a mandate substituted affirming the judgment of the Circuit Court of Waukesha County.

Justice Currie dissents.

[fol 45] IN SUPREME COURT OF WISCONSIN—AUGUST TERM,  
1954

No. 285

VOGT, INC., a Wisconsin Corporation, Respondent,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695,  
AFL; International Union of Operating Engineers, Local  
139, A. F. L.; and Building and Construction Laborers  
Union Local 392, A. F. L., Appellants

#### OPINION

GEHL, J. (On motion for rehearing).

We have concluded that we were in error in our original determination of the issues in this case, and, therefore, withdraw the opinion and the mandate previously entered. We are convinced that in our study of the issues presented we gave too little consideration to the fact that there are limitations upon the right of free speech, and that the prohibition of action against free speech is not intended to give immunity for every use or abuse of language. We gave insufficient notice to the fact that free speech is not the only right secured by our fundamental law, and that it must be weighed, here for instance, against the equally important right to engage in a legitimate business free from dictation [fol. 46] by an outside group, and the right to protection against unlawful conduct which will or may result in the destruction of a business; that both the right to labor and the right to carry on business are liberty and property. We left out of calculation the rule that the court is to consider not only the established facts as they appear in the record, but that it should also give attention to the inferences reasonably and justifiably to be drawn therefrom.

In considering the right of freedom of speech it must be recognized that that right is to be evaluated with the right of the many who have no interest whatever in the relationships between the defendant unions and those whom they seek to acquire as members; that by its very nature every right is related to a duty to exercise it so as to cause a minimum of harm to another, least of all to an innocent bystander; that the right may not be considered apart from that of society to maintain order; and that one who seeks freedom may not wholly ignore his neighbor's right to it.

"The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.'" *Teamsters Union v. Hanke* (1950), 339 U. S. 470, 474.

We have not found that the United States Supreme Court has ever held that the right of free speech is absolute and to be protected regardless of the effect its exercise may have upon other rights protected by the Constitution. We find no cases decided by that court in which it has been held that a state is without power to curtail the right when, in the exercise of its authority to establish and declare its public policy, it determines that such curtailment is necessary to protect the public interest and property rights. On the contrary, the court has said that:

"... since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity." *Building Service Union v. Gazzam* (1950), 339 U. S. 532, 537.

In *Bakery Drivers Local v. Wohl* (1942), 315 U. S. 769, the court said:

"A state is not required to tolerate in all places . . . even peaceful picketing by an individual."

And in a concurring opinion Mr. Justice Douglas said:

"Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

In *Giboney v. Empire Storage Co.* (1949), 336 U. S. 490, 502, the court, after calling attention to the importance to our society of a vigilant protection of freedom of speech, said:

"But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *Virginia Electric Co. v. Board*, 319 U. S. 533, 539; *Thomas v. Collins*, 323 U. S. 516, 536, 537, 538, 539-540. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas v. Collins*, *supra*, at 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. [fol. 48] But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. See e. g. *Fox v. Washington*, 236 U. S. 273, 277; *Chaplinsky v. New Hampshire*, 315 U. S. 568. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade

as well as many other agreements and conspiracies deemed injurious to society."

"Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance." *Hughes v. Superior Court* (1950), 339 U. S. 460, 465-466."

Consistently with the foregoing, we said in *Retail Clerk's Union v. Wisconsin E. R. Board* (1942), 242 Wis. 21, 37, 6 N. W. 698 that :

"Peaceful picketing is now recognized as an exercise of the right of free speech and therefore lawful. (Citing cases) However, it cannot be made the cover for concerted action against an employer in order to achieve an unlawful or prohibited object, such as to compel an employer to coerce his employees to join a union."

There is nothing in *American Federation of Labor v. Swing*, 312 U. S. 321, to support the proposition that freedom of speech includes the right by picketing to induce an employer or an employee to violate the provisions of the Wisconsin statutes, to which we shall later refer, and thus engage in an unfair labor practice and set at naught the declared public policy of the state. No statutory violation was involved in the *Swing* case. The issue was whether "the constitutional guaranty of freedom of discussion [was] infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute." All that was decided in that case was that such [fol. 49] a policy does abridge the exercise of freedom of speech by peaceful picketing. The case is distinguishable from the instant case in that it did not appear in that case that the picketing was in violation of any valid statute or that it was for an unlawful purpose. See discussion of the *Swing* case in *Wisconsin E. R. Board v. Milk, etc., Union* (1941), 238 Wis. 379, 299 N. W. 31.

By enactment of sec. 111.06 (2), Stats., the legislature has declared it to be an unfair labor practice and a viola-

tion of the public policy of this state for an employee individually or in consort with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

"(b) To coerce, intimidate, or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative."

Sec. 111.04, Stats., provides that:

"Employees shall have the right of self-organization and the right to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

By the provisions of subsection (3) of the statute it is made an unfair labor practice for *any person* to do any act so prohibited.

The United States Supreme Court has conceded to the states the right to prohibit the conduct defined in these statutes. In *Building Service Union v. Gazzam; supra*, the [fol. 50] court recognized the right of the State of Washington to declare its public policy on the subject and said:

"The State of Washington has by legislative enactment declared its public policy on the subject of organization of workers for bargaining purposes. The pertinent part of this statute is set forth in the margin. The meaning and effect of this declaration of policy is found in its application by the highest court of the State to the concrete facts of the instant case. Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference,

or restraint of employers of labor in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgement by the Fourteenth Amendment."

(The statute referred to is similar to our sec. 111.06 (2) (b)).

The question then arises whether the defendants violated sec. 111.06(2)(m) Stats., and thereby engaged in picketing for an unlawful purpose. The trial court refused to find, as plaintiff requested:

"That the picketing of plaintiff's premises has been engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel, or induce its employees to become members of defendant labor organizations, and for the purpose of injuring the plaintiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization."

We are of the opinion that the finding should have been made. Picketing may be more than free speech. When it is conducted, as it was in this instance, upon a rural highway at the entrance to a gravel pit where an exceedingly small number of possible or probable patrons of the owner's business might pass and be influenced by the Union's ban-[fol. 51] ner, it is more than the mere exercise of the right of free communication. One would be credulous indeed to believe under the circumstances that the Union had no thought of coercing the employer to interfere with its employees in their right to join or refuse to join the defendant Union. We have not the slightest doubt that it was the hope of the Union that the presence of pickets at plaintiff's place of

business would interfere with its operation and deprive it of delivery service, thus bringing pressure upon it to coerce its employees to join the Union.

The message carried upon the Union's banner could not possibly have been intended for the enlightenment of plaintiff's employees who "had been contacted by agents of the defendants for the purpose of inducing [them] to join one or more of defendant's labor organizations, and . . . had indicated to defendant Unions' agents that they did not desire to join any of said labor organizations, and . . . [who at the time of trial] had continued to refuse to become members of any of defendant labor organizations," as was found by the trial court, and which finding is not attacked upon this appeal. Conducted as the picketing was upon a country road and at the scene of the operation of a business which is ordinarily patronized by only a small part of the public, the message carried by the pickets could not have been intended for the guidance of the community. It is clear to us that its only purpose was to influence those who were engaged in transporting supplies and materials to and from plaintiff's place of business and that it was conducted in the hope that these persons would refuse to continue to serve plaintiff and thereby compel it to choose [fol. 52] between two alternatives,—permit the continuance of the picketing and suffer the consequent loss of profits and possibly of its business, or by some means or other to coerce or intimidate plaintiff's employees to join one of the Unions, and thereby violate the provisions of sec. 111.06(2) (b) Stats.

At this point it is important to note that the court made a finding (not attacked upon this appeal):

"That the drivers of several trucking companies have refused to deliver and haul goods and materials to and from plaintiff's premises as a result and in consequence of defendants' picketing of the plaintiff's premises, resulting in great inefficiency, inconvenience, extra labor and expense, and much damage to plaintiff."

and a conclusion (also not attacked):

"That the plaintiff has suffered, and continuation of the defendants' conduct would further cause it to suffer,

irreparable damage; and that the plaintiff has no adequate remedy at law."

The inference that the picketing was conducted for an unlawful purpose is inescapable.

We are of the opinion that the court should have made the finding requested by the plaintiff, and that since the facts as to which the request was made are undisputed and the inferences are only one way, we should reverse for error in so refusing. 5 C.J.S. 802. If, however, we may not do that, we are at liberty to and should supply the finding.

In *Pappas v. Stacey* 1955), — Mo. —, 116 Atl. (2d), 497, a case in many respects similar to this and regarding which more will be said, the Maine court supplied a similar finding and said that the rule that a trial judge's finding should not be reversed unless it clearly appears that the decision is [fol. 53] erroneous, it is not applicable in a case which involves no oral testimony. The reason for the rule to which the court refers is obvious. The appellate court must give weight to the findings of a trial court made in a contested matter upon oral testimony where the trial judge is in a position to pass on the credibility of the witnesses and the weight to be given to their testimony. He has full opportunity to observe the demeanor of the witnesses and judge their veracity—the appellate court does not. The reason for the rule disappears, however, when the appeal is presented upon no more than pleadings and affidavits, as is the case here. This court has held that a statement of a trial court denominating as a finding that which is in the nature of a legal conclusion from undisputed evidence may be disregarded by us. *Weigell v. Gregg* (1915), 161 Wis. 413, 154 N. W. 645, that a finding upon practically undisputed evidence is not as conclusive as it is in cases where there is a conflict of evidence, *Saylor v. Marshall & Hsley Bank* (1937), 224 Wis. 511, 272 N. W. 369, that where the question presented is one of applying the law to the undisputed facts we are not bound by the trial court's findings, *Dairy Queen of Wisconsin, Inc. v. McDowell* (1952), 260 Wis. 471, 51 N. W. (2d) 34, and in *Will of Mechler* (1944), 246 Wis. 45, 55, 16 N. W. (2d) 373, we said that:

"Generally, the rule applicable to findings of fact made by the trial court does not apply where there are

no disputed questions of fact because the reason for the rule itself fails. (In a certain class of cases inferences are said to be within the rule.) The reason for the rule is that fact finding is primarily a function of the trial court while on appeal this court deals mainly with questions of law. The position of the trial court for the determination of factual questions is obviously superior to that of the appellate court, in that the trial [fol. 54] court has an opportunity to observe the witnesses, note their demeanor, the manner in which they testify, their intelligence or lack of it, and many other intangible things which it is impossible to place upon a court record. None of these considerations apply to a determination of a court made upon undisputed facts where the interpretation of a written instrument is under consideration. The reason for the rule failing, the rule itself fails."

We see no distinction between the case where the court is called upon to deal with or construe a written instrument and where, as here, the court is required to study only pleadings and affidavits.

*Pappas v. Stacey; supra*, was a case strikingly similar in facts. There was peaceful picketing conducted for the purpose of seeking to organize non-union employees. There was no dispute between the employer and his employees. The plaintiff had suffered and would continue to suffer in his business as a result of the picketing. The court held that the picketing was conducted for an unlawful purpose, in violation of a statute which contains provisions quite similar to those with which we are concerned, and which read as follows:

"Workers shall have full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference, restraint or coercion by their employers or other persons. . . ."

The parties had stipulated that the picketing was conducted for the sole purpose of seeking to organize em-

ployees of the plaintiff but the court supplied the finding, as we do here, that the purpose of the picketing was to coerce the employer to bring pressure upon the employees to join the Union, and that compliance with the pressure [fol. 55] so exerted would result in a violation of the statute as being interference with the right of the employees to choose their own representatives. The court held that the restraint of the picketing by the lower court would not abridge the right of free speech under the federal constitution. The court was careful to point out that although the case was one to be treated as involving an unlawful strike, the same result would have to be reached if only picketing were involved.

We quote at some length from the opinion of the court because we believe that its expression is a sufficient answer to the contention of the Union and because its language is clearly applicable to our problem. Among other things the court said:

"Under the statute . . . the employee, or worker, is protected from 'interference, restraint or coercion by their employers or other persons. . . .' The worker must be left free from interference by employer or other persons in reaching a decision whether to join or refrain from joining a union. It follows necessarily that pressure cannot lawfully be directed against the employer to force him to interfere with the free choice of his employees. The plaintiff cannot lawfully be placed in a position where compliance with the strikers' demands requires action in violation of the law of the State.

"This is, however, precisely what the strikers here seek to accomplish. In brief, the strike for organizational purposes is unlawful for it is by its very nature destructive of the protection for the employees provided by the statute. . . .

"A coercive force is generated by the picketing to secure new members for the union. It is apparent that this force is applied to the employer to urge his employees to join the union to save his business, and to the employees to join to save their livelihood.

"In reaching for the employees, there is a steady and

exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during noncompliance by the employees with the requests of the union. . . .

“The purpose of the picketing here, that is the immediate purpose, is solely to bring employees into Local [fol. 56] 390. We are not interested in the ultimate form of the relations between the plaintiff and his employees. . . .

“statute, [to which we have referred], is a solemn declaration of the public policy of our State. It is the law, duly enacted by the Legislature, which must govern the decision in this case. Within the plain and clear meaning and intent of the statute we find, as we have indicated, a public policy against peaceful picketing at the place of business for organizational purposes. In our opinion the restraint of such picketing does not abridge the right of free speech under the decisions of the Supreme Court.”

It is worthy of note that an appeal was taken to the United States Supreme Court. There is no record of the Federal court's action except an entry in its journal, as follows:

“The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas would note probable jurisdiction.”

It would appear from this entry that the court dismissed the appeal because no federal question was presented, suggesting that the court did not consider itself bound by the rule of the *Swing* case which, when this case was first studied by us, we considered as requiring reversal.

The defendants contend that we may not be concerned with the fact that the picketing has caused a loss to plaintiff. We may concede that workmen's infliction of incidental damage to others by use of lawful methods of action in the field of labor does not warrant injunctive relief. Counsel have called our attention, however, to no authority, nor have we been able to find one, for the proposition that the

courts must close their eyes to the loss where the conduct which causes the loss constitutes a violation of a statute, as we find in the case here.

We conclude that the picketing was conducted for an [fol. 57] unlawful purpose and that, therefore, the trial court properly enjoined it.

Our decision is not to be construed as holding that the state may forbid peaceful picketing solely because there is no immediate employer-employee dispute as was held in the *Swing* case.

*By the court.*—The original mandate herein is vacated and a mandate substituted affirming the judgment.

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[fol. 58] [File endorsement omitted.]

CURRIE, J. (DISSENTING) I must respectfully dissent from the majority opinion filed upon the rehearing granted in this case because neither the briefs of counsel, nor anything stated in the new opinion, convince me that our original opinion was erroneous. I would adhere to such original opinion except in the one minor respect hereinafter mentioned.

There is much stated in the new opinion with which I fully concur although disagreeing with the final result determined therein. Before touching upon the area of dissent it would seem advisable to list the matters as to which there is complete agreement. These are:

(1) While the wording on the signs carried by pickets constitutes the exercise of free speech, the physical presence of the pickets makes picketing something more than free speech.

[fol. 59] (2) Because picketing does embrace more than free speech, any state has the right to regulate or prohibit the same when carried on with respect to a business, whose labor relations are not subject to federal regulation under the Taft-Hartley Act, if conducted to achieve an unlawful objective; and in exercising such right the state does not violate the provisions of the First and Fourteenth amendments to the United States constitution.

(3) Picketing, which is conducted for the purpose of co-

ercing or inducing an employer in such a business to interfere with the right of his employees to join any labor organization of their own choosing, or to refrain from so doing, is for an unlawful objective in that it violates the provisions of sec. 111.06 (2) (b), Wis. Stats.

(4) Where a question of fact is presented on an appeal to this court as to whether peaceful picketing was conducted for an unlawful objective, and no parol testimony had been taken before the trial court but instead the proof in the record consists solely of affidavits or stipulated facts, this court is not concluded by findings of the trial court based upon inferences drawn from such affidavits or stipulated facts but is free to draw its own inferences from such record.

The trial judge in the instant case expressly found "that the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's [sic]." The request of plaintiff's counsel for an express finding that the picketing had been carried on for the purpose of coercing or inducing the plaintiff employer to interfere with the rights of its employees to join or not join the defendant unions, was denied. Plaintiff had expressly pleaded that the picketing violated sec. 111.06 (2) (b) so that such requested finding was in keeping with such allegation. This [fol. 60] court in its original opinion expressly determined that "*the testimony would not have supported a finding of the facts constituting a violation of either of the subsections*" [sec. 111.06 (2) (a) or 111.06 (2) (b)]. See p. 319 of the original opinion.

*Plaintiff at no time pleaded that the picketing constituted a violation of sec. 111.06 (2) (a),<sup>1</sup> a fact which was again*

---

<sup>1</sup> Sec. 111.06 (2) (a), Stats., reads:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family."

conceded in plaintiff's brief on rehearing. Therefore, for the purpose of this appeal, sec. 111.06 (2) (a) should not have been referred to in our original opinion nor is it proper to consider its possible application on the rehearing. Plaintiff's right to an injunction restraining the picketing must stand or fall on the issue of whether the picketing violated sec. 111.06 (2) (b).

We come now to an analysis of the facts appearing in the record. No demand was ever made by or in behalf of the defendants upon the employer for union recognition or otherwise. The defendant unions had, however, made persistent efforts by personal solicitation to induce plaintiff's employees to join the defendant unions which efforts failed. These efforts to organize were then followed by the peaceful picketing. The drivers of trucks of other employers refused to cross the picket line to haul plaintiff's product or to make delivery of materials to plaintiff's gravel pit, thereby causing damage to the plaintiff.

[fol. 61] As pointed out in the majority opinion, the picketing was conducted at a spot out in the country where there was little travel by the public. This permits of the reasonable inference that the picketing was not for the purpose of disseminating information to the general public. The two remaining conceivable objectives are: (1) to attempt to induce plaintiff's employees to join the defendant unions; or (2) to coerce the plaintiff employer into taking some affirmative action of a coercive nature to induce its employees to join the defendant unions. It is only if the last of these two alternatives is found to be the purpose of the picketing that an injunction may be entered restraining the picketing because plaintiff so limited the issue by its pleadings and its contentions in the trial court.

The mere fact that some damage resulted to the plaintiff employer from the picketing does not establish that the picketing was for an unlawful purpose. *Wisconsin E. R. Board v. Retail Clerks Int. Union* (1953), 264 Wis. 189, 194, 58 N. W. (2d) 655; *Painters & Paperhangers Local U. v. Rountree Corp.* (1952), 194 Va. 148, 72 S. E. (2d) 402, 405. The facts that the defendants prior to the picketing had attempted by personal solicitation to induce the employees to join the defendant unions while no demand whatsoever

was ever made upon the plaintiff employer, strongly supports the inference drawn by the learned trial judge that the picketing was for the purpose of inducing some conduct on the part of the employees. This seems to me to be a more reasonable inference than that its objective was to cause the employer to engage in the unlawful activity prohibited by sec. 111.06 (2) (b).

The inference which the majority of the court draws from these acts of solicitation of the employees prior to the picketing runs exactly counter to the reasoning of the Missouri court in *Bellerive Country Club v. McVey* (Mo. 1955), 284 S. W. (2d) 492. In that case, as in the instant case, the plaintiff employer sought to enjoin peaceful picketing on the ground that its objective was to seek to coerce [fol. 62] the employer to take action to force its employees into the union doing the picketing, thereby rendering such objective unlawful under Missouri law. About a year prior to the picketing the union contacted the plaintiff country club and asked permission to come upon the club's property to talk to the employees in order to induce them to join the union. This request was denied. In the year which ensued between such request and the picketing, the union made no attempt to contact the employees in any way to induce them to join. The picketing was instituted on the opening day of the Western Open Golf Tournament at the club and as a result deliveries of such items as beer and soft drinks were immediately cut off because of the refusal of truck drivers to cross the picket line, and a union orchestra refused to play at a scheduled club dance. One of the reasons advanced by the Missouri court in holding that the picketing was for an unlawful objective, was the failure of the union to have undertaken any solicitation of the employees for union membership prior to the picketing. The majority opinion in the instant case, on the other hand, bases its inference of unlawful objective (to cause the plaintiff employer to take action to force its employees into the defendant unions) on the fact that the unions had prior to the picketing solicited the employees for membership but such prior organizing activities had been unsuccessful.

It is elementary that the burden of proving an unlawful

purpose in the instant case is upon the plaintiff. 20 Am. Jur., Evidence, p. 1043, sec. 1189, states:

"To establish a theory by circumstantial evidence, the known facts relied upon as a basis for the theory must be of such nature and so related to each other that the only reasonable conclusion to be drawn therefrom is the theory sought to be established. *A fact is not proved by circumstances if they are merely consistent with its existence or if other inferences may reasonably be drawn from the facts in evidence.*" (Emphasis supplied.)

[fol. 63] Applying the above stated principle to the instant case, I feel that this court should uphold the inference drawn by the trial court, viz., that the objective of the picketing was for organizational purposes to induce the employees to join the defendant unions.

There is an even more compelling reason why an injunction should not be grounded in this case on any application of the provisions of sec. 111.06(2) (a) than the fact that such issue was not raised in the trial court or in this court until the motion for rehearing. Such further reason is that there is a grave doubt as to whether peaceful organizational picketing conducted at a place of employment solely for the purpose of inducing employees to join a union can ever be held to constitute a violation of sec. 111.06 (2) (a). To seek to induce employees to join a union is a *lawful objective*. In order for this court to hold that peaceful organizational picketing may be prohibited as a violation of sec. 111.06 (2) (a), it, therefore, necessarily follows that we would have to find that *the means and not the objective was unlawful*.

Thus far the United States Supreme court has only upheld the right of a state to prohibit peaceful picketing when the picketing was conducted for an *unlawful objective*. It has never held that peaceful picketing may be enjoined as an *unlawful means to attain a lawful objective*. The dismissal by that court of the appeal from the judgment of the Main court in *Pappas v. Stacey* (Me. 1955), 116 Atl. (2d) 497, cannot be construed as upholding the right of a state to prohibit peaceful organizational picketing. In

the *Pappas* Case, three employees of the plaintiff employer had gone on strike in an attempt to induce the employer to recognize the union and joined in the picketing. This in itself afforded adequate proof that the picketing had the unlawful objective of seeking to cause the employer to [fol. 64] take action to coerce his employees into joining the union and the court so held. In addition, the court also held that even if the picketing were solely for organizational purposes it could be enjoined. Thus the decision found that the picketing could be enjoined on two grounds, the first of which had been upheld by prior decisions of the United States Supreme Court, and the second of which has not been.

The United States Supreme Court does not consider that an appeal presents a substantial federal question if the issue raised has been directly passed upon in its prior decisions. Stern & Gressman, *Supreme Court Practice* (2d), p. 81, and *Palmer Oil Corp. v. Amerada Corp.* (1952), 343 U. S. 390, 72 Sup. Ct. 842, 96 L. Ed. 1022. Such court also will not review a state court judgment based upon two or more grounds, one of which presents no substantial federal question. Stern & Gressman, p. 94, G, and note in 95 U. of Pa. L. Rev. (1947), 764, entitled "Supreme Court Review of State Court Decisions Involving Multiple Questions".

Because of the gravity of the problem of whether peaceful organizational picketing may be enjoined as a violation of sec. 11106 (2) (a), this court should not pass on such question until the issue has been properly raised in the trial court and the issue has been fully briefed and argued here. Neither was done in the instant case.

[fol. 65] [SEAL.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2224-4)

MAY 4 1956

HAROLD B. WILLEY, Clerk

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1955.

No. ...

~~925~~ 79

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL  
695, A. F. L., INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 139, A. F. L.; and BUILDING  
& CONSTRUCTION LABORERS UNION,  
LOCAL 392, A. F. L.,  
Petitioners,

v.

VOGT, INC.,  
Respondent.

**PETITION FOR A WRIT OF CERTIORARI**  
To the Supreme Court of Wisconsin.

DAVID PREVIAINT,  
511 Warner Theatre Building,  
Milwaukee, Wisconsin,  
Counsel for Petitioners.

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1955.

No. ....

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL  
695, A. F. L.; INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 139, A. F. L.; and BUILDING  
& CONSTRUCTION LABORERS UNION,  
LOCAL 392, A. F. L.,  
Petitioners,

v.

VOGT, INC.,  
Respondent.

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**PETITION FOR A WRIT OF CERTIORARI**  
**To the Supreme Court of Wisconsin.**

Petitioners pray that a writ of certiorari issue to review the judgment of the Wisconsin supreme court entered in the above entitled case on February 7, 1956.

**CITATIONS TO OPINIONS BELOW.**

The memorandum opinion of the circuit court of Waukesha County, Wisconsin, is unreported and is printed in the Certified Record (R. 101-103). The opinions of the Wisconsin supreme court are reported in 270 Wis. 315, 71 N. W. 2d 359, and 272 Wis. (Advance) 321a, 74 N. W. 2d 749, and are printed in Appendix B, *infra*, p. 14.

**JURISDICTION.**

The Wisconsin supreme court, on June 28, 1955, entered a mandate reversing the judgment of the circuit court for Waukesha County. A motion for rehearing was filed by the respondent, herein, on July 18, 1955, and was granted on October 5, 1955. On February 7, 1956, the Wisconsin su-

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preme court withdrew its original mandate and affirmed the judgment of the circuit court. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3), since rights, privileges and immunities specially set up and claimed under the Federal Constitution have been denied.

### **QUESTION PRESENTED.**

Whether peaceful picketing, having as its purpose the publication of the facts of a labor dispute and the organization of non-union employees, preceded by solicitation of non-union employees and conducted on a town road bordering the situs of the dispute, and which is unaccompanied by demands of any kind upon the employer, is constitutionally protected under the First and Fourteenth Amendments to the Constitution of the United States.

### **CONSTITUTIONAL PROVISIONS INVOLVED.**

The constitutional provisions involved are the First and Fourteenth Amendments to the Federal Constitution. They are printed in Appendix A, infra, p. 13.

### **STATEMENT.**

(The Record in the Court below was printed in narrative form as an Appendix. Such Appendix has been filed herein in lieu of the original Record under Rule 21 (3) of this Court. References to the Record (R.) are references to the pages of the Appendix, except as to the proceedings in the State Supreme Court, in which case Record references are to the Record certified by the Clerk of the Wisconsin Supreme Court.)

Respondent Vogt, Inc. (hereinafter referred to as Vogt), operates a gravel pit in the Town of Oconomowoc, Waukesha County, Wisconsin (R. 104, 116, 122). Between the fall of 1953 (R. 112) and the spring of 1954 (R. 111), the petitioning Unions discussed the advantages of Union affiliation with several of Vogt's employees (R. 107, 111-

115, 117, 122). Vogt employs ten to fifteen men, none of whom are members of the petitioning Unions (R. 107-108, 117, 122).

The Unions commenced peaceful picketing on the town road bordering Vogt's gravel pit (R. 105, 116, 122), on July 13, 1954 (R. 106, 116, 122). The sign carried by the picketers stated: "The men on this job are not 100% affiliated with the A. F. L." (R. 106, 116, 122). No demands of any kind were made upon Vogt and the picketing was at all times peaceful (R. 136-137).

Vogt filed a complaint in Waukesha County Circuit Court demanding that a permanent injunction be issued against the Unions' peaceful picketing (R. 109-110). The Unions' answer affirmatively alleged that their activities were for a lawful purpose and were protected under the First and Fourteenth Amendments of the Federal Constitution (R. 119). The Circuit Court found that the purpose of the picketing was to induce Vogt's employees to affiliate with the picketing Unions (R. 101, 122); it refused to find that the picketing was being conducted for an unlawful purpose (R. 101). A permanent injunction was nevertheless issued on November 9, 1954 (R. 126-127), because no labor dispute as defined by state law existed (R. 123).<sup>1</sup>

<sup>1</sup> Wis Stat., Sec. 103.535 (1953), provides:

"It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employees, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employees or their representatives."

Wis. Stat., Sec. 103.62 (3) (1953), provides:

"The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

The court below, in an unanimous opinion rendered on June 28, 1955, affirmed the circuit court's findings of fact, stating that [R. 136-137, App. B (18)]:

"The testimony would not have supported a finding of the facts constituting a violation of either of the subsections.<sup>2</sup> No threats were made against the plaintiff; no demands were made upon it. It does not appear that any of the defendants' representatives had even spoken to plaintiff's officers about their desire to organize its employees. There was no violence, no force, and no threat of force, no disorder or physical obstruction to plaintiff's property. There was no evidence that defendants' representatives had coerced or intimidated any of plaintiff's employees in their right to join or refuse to join either of defendant unions. There was only peaceful persuasion exercised by the carrying of a banner bearing a truthful legend."

The Court below, therefore, held that under the decision of this Court in **A. F. of L. v. Swing**, 312 U. S. 321, the Unions' activities were constitutionally protected and could not be enjoined [R. 138-139, App. B (19-20)]. The judgment of the Circuit Court was accordingly reversed with directions to dissolve the injunction and dismiss the complaint [R. 132, App. B (20)].

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<sup>2</sup> The court was referring to the provisions of the state labor relations act which make it unfair labor practice:

"To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family." Wis. Stat., Sec. 111.06 (2) (a) (1953).

"To ~~coerce~~, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative." Wis. Stat., Sec. 111.06 (2) (b) (1953).

A motion for re-hearing was filed by Vogt on July 9, 1955 (R. 140). Although no additional evidence was introduced, the Court below, on February 7, 1956, withdrew its original opinion and mandate and affirmed the judgment of the Circuit Court [R. 145, App. B (41)].

The Court below stated that, since the Unions had discussed the advantages of union membership with Vogt's employees and since the picketing was conducted on a lightly-traveled town road, the only inference which could be drawn was that the purpose of the picketing was to compel Vogt to force its employees to affiliate with the Unions (R. 152, 153, App. B 28-29).<sup>3</sup> **On this basis the Court reversed its own and the Circuit Court's prior findings to the contrary, withdrew its earlier unanimous decision and, with one Judge dissenting, the Circuit Court's judgment granting a permanent injunction was affirmed [R. 145, App. B (41)].**

### **HOW FEDERAL QUESTION IS PRESENTED.**

The Unions' answer affirmatively alleged that their conduct was protected under the First and Fourteenth Amendments of the Federal Constitution (R. 119-120). The Circuit Court considered and rejected this claim (R. 102-103, 123). The Court below in its original opinion held that the decision of this Court in **A. F. of L. v. Swing**, 312 U. S. 321, established that the picketing constituted an exercise of free speech protected by the Federal Constitution (R. 138-139, App. B 20). On rehearing, the Court below held that the decision of this Court in **Building Service Union v. Gazzam**, 339 U. S. 532, permitted the issuance of an injunction under facts it considered similar to those of this case without denying to the Unions rights guaranteed under the Federal Constitution [R. 150-151, App. B (27)].

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<sup>3</sup> This Court is, of course, not bound by the findings of the court below. *Plumbers Union v. Graham*, 345 U. S. 192, 197; *Milk Wagon Drivers v. Meadowmoor Dairy Co.*, 312 U. S. 287, 293-294.

## REASONS FOR GRANTING THE WRIT.

1. **The Court Below Has Caused the Forfeiture of the Right of Free Speech Because of Such Extraneous Factors as Unsuccessful, Direct Solicitation of Non-Union Employees and Traffic Counts.**

The Court below concluded that the Unions' picketing was for an unlawful purpose solely because: (1) Solicitation of Vogt's non-union employees preceded the picketing, and (2) the picketing was conducted on a lightly-traveled town road. [R. 152, App. B (28-29)].<sup>4</sup> The decisions of this Court do not permit such finding of unlawful purpose on only these facts.

In both **Bakery Drivers Local v. Wohl**, 315 U. S. 769, 771, and **A. F. of L. v. Swing**, 312 U. S. 321, 323, attempts to persuade non-union employees to join the union preceded the picketing. The picketing was held to be constitutionally protected in both cases. Indeed, this Court stated in the **Wohl** case, 315 U. S., at 775, that there were "no circumstances" from which an inference of unlawful conduct could be drawn.

Of course, from the fact of solicitation there must follow the common sense inference that the Unions hoped to convince Vogt's non-union employees of the merits of union affiliation. But to draw the legal conclusion from such hope that the picketing was for the purpose of compelling Vogt to interfere with its employees' right of self organization is sheer speculation with no basis in fact or law.

Nor does "traffic count" give any support to such contention. The picketing in this case took place on a town road bordering Vogt's gravel pit (R. 106, 116, 122). The Unions were seeking to organize the non-union employees who worked in this gravel pit (R. 107, 111-115, 117, 122).

<sup>4</sup> The record is completely barren of any evidence concerning the number of cars or people that travel this town road.

The Court below concluded that since only a small number of people might pass the gravel pit, it necessarily followed that the picketing could not be for the purpose of communication, and therefore must be for an unlawful purpose [R. 152-153, App. B (28)]. But this Court has never suggested that the constitutional right to freedom of speech must be forfeited if the speaker's audience is small in number. In **Thornhill v. Alabama**, 310 U. S. 88, this Court said (at p. 106):

“ \* \* \* (The) streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”

Compare **Carlson v. California**, 310 U. S. 106, and **Kovacs v. Cooper**, 336 U. S. 77.

To deny a constitutional right because of an alleged unlawful purpose, when such finding is based solely upon previous unsuccessful solicitation of non-union employees, a small audience and some economic injury to the employer, without more, is surely to defeat constitutional freedom “by insubstantial findings of fact screening reality.” **Milk Wagon Drivers v. Meadowmoor Dairies**, 312 U. S. 287, 293. Such finding of unlawful purpose is clearly a “spurious” one. **Meadowmoor**, supra, at page 299.

2. **An Injunction Against Peaceful Picketing at the Site of a Labor Dispute Has Been Permitted by This Court Only Where Unlawful Demands Were Made Upon an Employer.**

The decisions of this Court make it clear that peaceful picketing, as an exercise of free speech, is entitled to the protection of the First and Fourteenth Amendments of the Federal Constitution. **Cafeteria Union v. Angelos**, 320 U. S. 293, 295; **Carlson v. California**, 310 U. S. 106, 112-

113; **Thornhill v. Alabama**, 310 U. S. 88, 102; **Senn v. Tile Layers Union**, 301 U. S. 468, 478. Because peaceful picketing is an exercise of free speech this Court has held that it can not be enjoined merely because no labor dispute as defined by state law exists. **Bakery Drivers Local v. Wohl**, 315 U. S. 769, 774; **A. F. of L. v. Swing**, 312 U. S. 321, 325-326.

Of course, no right is absolute. Thus this Court has permitted injunctions where picketing was enmeshed with violence, **Hotel and Restaurant Employees' Local v. Wisconsin Employment Relations Board**, 315 U. S. 437; **Milk Wagon Drivers' Union v. Meadowmoor Dairies**, 312 U. S. 287, and where picketing was conducted at a place unrelated to the dispute, **Carpenters Union v. Ritter's Cafe**, 315 U. S. 722. Neither of these limitations is material to this petition because it is undisputed that the picketing was at all times peaceful (R. 136-137, App. B 18), and was conducted at the site of the dispute (R. 106, 116, 122).

A second group of cases has come to this Court in which an injunction against peaceful picketing has been allowed. These involved picketing for an unlawful purpose. But in each and every case in this group the record affirmatively showed that an unlawful demand was actually made upon the employer. **Plumbers Union v. Graham**, 345 U. S. 192, 198-199; **Building Service Union v. Gazzam**, 339 U. S. 532, 533-535; **Teamsters Union v. Hanke**, 339 U. S. 470, 472-474; **Hughes v. Superior Court**, 339 U. S. 460, 461; **Giboney v. Empire Storage Co.**, 336 U. S. 490, 492. The injunction sanctioned by the court below cannot be sustained on the authority of these cases because it is undisputed that no demands of any kind were made upon Vogt (R. 136-137, App. B [18]).

The **Gazzam** case, *supra*, was principally relied on by the court below, but in that case the record affirmatively showed repeated demands for a closed shop and for recognition by the picketing union. Nevertheless, this Court,

recognizing that "the right of free discussion . . . is to be guarded with a jealous eye," **A. F. of L. v. Swing**, 312 U. S. 321, 325; was careful to point out in the **Gazzam** opinion, 339 U. S., at 539-540, that it was not sanctioning an injunction against "picketing of workers by other workers." The clear implication, we believe, is that picketing for organizational purposes is entitled to Constitutional protection.

3. **"Organizational" or "Communication" Picketing Has Not Received, in the Various State Courts of Last Resort, That Protection to Which It Is Entitled Under the Decisions of This Court.**

"Organizational picketing," as the term is commonly understood, is peaceful picketing, unaccompanied by any demands upon an employer, by a Union which does not represent a majority of the employees of the employer at whose premises the picketing is taking place. The obvious purpose of such picketing is to make the non-union status of the employees known to the public. Because of possible diversion of patronage and other beneficial business relationships to union members as a result of such communication, the non-union employees may be persuaded that their best interests can be secured through union membership. Hence the term "organizational" picketing. It is also "communication" or "information" picketing in every sense of such terms. Organizational picketing, so defined, has not enjoyed in this or other cases the protection to which it is entitled under the decisions of this Court.<sup>5</sup> *may out*

<sup>5</sup> The objective sought by "organizational picketing" is to be distinguished from the objective sought by "recognition picketing," which is picketing by a union representing a ~~majority~~ of the employees and is for the purpose of compelling the employer to recognize it as the collective bargaining agent for all the employees. This type of picketing for recognition is unlawful when the union does not represent a majority and therefore becomes "picketing of an employer to compel him to coerce his employees' choice of a bargaining representative" in violation of state law. *Building Service Employees International Union v. Gazzam*, 339 U. S. 532, 538-539.

The varied treatment of the presence or absence of solicitation of non-union employees in the many state courts, exemplifies the confusion in this area. In a number of cases, the fact of solicitation was not considered evidence of an unlawful purpose. E. g., **Wood v. O'Grady**, 307 N. Y. 532, 536, 122 N. E. 2d 386, 387; **Ira A. Watson Co. v. Wilson**, 187 Tenn. 402, 403, 215 S. W. 2d 801, 802; **Whitehead v. Miami Laundry Company**, 160 Fla. 667, 668, 36 So. 2d 382; **Self v. Wisener** (Ark.), 30 CCH Labor Cases 69,854. Yet the Court below relied heavily upon the fact of solicitation to justify its conclusion that the picketing was for an unlawful purpose (R. 152, App. B 28). And while other Courts have considered the **absence** of solicitation to be evidence of an unlawful purpose, they have also relied upon other activities which they believed support such conclusion. **Bellerive Country Club v. McVey** (Mo.), 284 S. W. 2d 492, 501-502; **Chucales v. Royalty**, 164 Ohio St. 254, 129 N. E. 2d 823, 825.

Here, in addition to the fact of solicitation, the Court below stressed the light traffic on the town road bordering Vogt's gravel pit (R. 151-152, App. B. 38-39). But in **International Union of Operating Engineers v. Utah Labor Relations Board**, 115 Utah 183, 201-202, 203 P. 2d 404, 413-414, peaceful picketing by a minority union of a **mountain** construction site was held to be constitutionally protected.

We believe it clear, in view of the absence of any factual support for the finding of an unlawful purpose, that the real basis of the holding below is that organizational picketing, *per se*, enjoys no constitutional protection. The Court below stated (R. 155, App. B. 42):

"**Pappas v. Stacey** (151 Me. 36, 116 A. 2d 497, **appeal dismissed** 350 U. S. 870) was a case strikingly similar in its facts. There was peaceful picketing conducted for the purpose of seeking to organize non-union employees. There was no dispute between the employer and his employees. The plaintiff had suffered and

would continue to suffer in his business as a result of the picketing. The court held that the picketing was conducted for an unlawful purpose, in violation of a statute which contains provisions quite similar to those with which we are concerned . . . .<sup>6</sup>

Thus, the court below has, in effect, declared that it will automatically impute an unlawful purpose in any case where picketing by a non-majority union indirectly causes economic loss to an employer. This Court held precisely to the contrary in **Bakery Drivers Local v. Wohl**, 315 U. S. 769, and **A. F. of L. v. Swing**, 312 U. S. 321; however the court below is apparently of the view that the **Swing** case is no longer the law of the land.<sup>7</sup>

### CONCLUSION.

Apparently the Court below, and many other state courts, have read this Court's later decisions in the **Giboney**, **Hanke** and **Gazzam** cases as completely reversing its

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<sup>6</sup> The dissenting justice in the court below pointed out (R. 164-165, App. B [40]):

"In the *Pappas* case, three employees of the plaintiff employer had gone on strike in an attempt to induce the employer to recognize the union and joined in the picketing. This in itself afforded adequate proof that the picketing had the unlawful objective of seeking to cause the employer to take action to coerce his employees into joining the union and the court so held. In addition, the court also held that even if the picketing were solely for organizational purposes it could be enjoined. Thus the decision found that the picketing could be enjoined on two grounds, the first of which had been upheld by prior decisions of the United States Supreme Court; and the second of which has not been." (Emphasis ours.)

<sup>7</sup> Commenting on this Court's dismissal of the appeal in the *Pappas* case, the Court below stated (R. 157, App. B [34]):

"It would appear from this entry that the Court dismissed the appeal because no federal question was presented, suggesting that the court did not consider itself bound by the rule of the *Swing* case which, when this case was first studied by us, we considered as requiring reversal."

This demonstrates the extremes to which the court below is willing to go in drawing "inferences."

earlier decisions in the **Thornhill**, **Swing**, and **Wohl** cases, or, in the alternative, are using the concept of “unlawful purpose”, with no support in the record, to deprive large groups of workers of the constitutional right of free communication whenever the exercise of such right causes injury to economic interest deemed by them to be of superior rank. **The contrast between the first and second decisions of the Court below in this case, and the assigned reasons for the Court’s self-reversal, dramatically demonstrate the need for further expression and guidance from this Court on this important constitutional problem.**

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of the State of Wisconsin, commanding that Court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered 285 and entitled **Vogt, Inc., a Wisconsin Corporation, v. International Brotherhood of Teamsters, Local 695, A. F. L.; International Union of Operating Engineers, Local 139, A. F. L.; and Building & Construction Laborers Union, Local 392, A. F. L.,** and that the judgment of the Supreme Court of the State of Wisconsin may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and meet; and your petitioners will ever pray.

**DAVID PREVIAINT,**

Counsel for Petitioners.

## APPENDIX A.

### First Amendment.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

### Fourteenth Amendment.

#### Section 1.

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

## APPENDIX B.

### 1. First Opinion of the Wisconsin Supreme Court.

State of Wisconsin

In Supreme Court

August Term, 1954.

No. 285.

Vogt, Inc., a Wisconsin Corporation, Respondent,

v.

International Brotherhood of Teamsters, Local 695,

A. F. L.; International Union of Operating

Engineers, Local 139, A. F. L.; and

Building & Construction Laborers

Union, Local 392, A. F. L.,

Appellants.

Appeal from a judgment of the circuit court for Waukesha County, Herbert A. Bunde, circuit judge.

#### **Reversed and remanded.**

In 1954 plaintiff operated a gravel pit in the town of Oconomowoc, Waukesha County. It was engaged in the business of producing and selling washed sand and gravel and ready-mixed concrete. For the operation of its business it received by truck cement, steel products and other materials. On July 13, 1954, the defendant unions stationed pickets at the entrance to plaintiff's property on a town road upon which plaintiff's property abuts. The location was not frequented by the general public. The pickets carried signs reading:

"The men on this job are not 100% affiliated with the A. F. L.

Building & Construction Laborers Union,  
Local 392,

Operating Engineers Union, Local 139,

Teamsters Union, Local 695."

Because of the picketing some of the truck drivers who had been hauling materials to plaintiff's plant refused to cross the picket line to deliver materials. Plaintiff's employees had been solicited to join defendant unions but had refused and had indicated that they did not desire to join. No labor dispute or controversy of any kind existed. None of the members of the defendant unions were in plaintiff's employ. The trial court found as follows:

"2. That the drivers of several trucking companies have refused to deliver and haul goods and materials to and from plaintiff's premises as a result and in consequence of defendant's picketing of the plaintiff's premises, resulting in great inefficiency, inconvenience, extra labor and expense, and much damage to plaintiff.

"3. That the facts as alleged in paragraph 13 of the complaint, admitted in paragraph 7 of the defendants' answer, are true and correct, and further, that the plaintiff's employees do not desire to join defendant labor organizations and continue to refuse to become members of such labor organizations.

"4. That the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's (sic).

"5. That no labor dispute or controversy has been or is in existence between the plaintiff and any of its employees, or between the plaintiff and the defendants, concerning the right or process or details of collective bargaining, or concerning the designation of bargaining representatives, and that the picketing of the plaintiff's premises by the defendants was not undertaken because of any such labor dispute or controversy, as defined in Sec. 103.62 (3), Wis. Stats."

Upon appropriate conclusions of law judgment was entered on November 9, 1954, permanently restraining de-

fendants from picketing at the premises. Defendants appeal.

**Gehl, J.** In a memorandum opinion filed by the trial judge he stated his conclusion that the picketing had not been conducted for an unlawful purpose, but that it constituted a violation of Section 103.535, Stats., which provides as follows:

“Unlawful conduct in labor controversies. It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employes, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employees or their representatives.”

Sec. 103.62, Stats., provides:

“(3) The term ‘labor dispute’ means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith.”

The question whether picketing as it is described in these statutes, but otherwise lawful, may be enjoined, has not been squarely presented to this court. Counsel for defendants contend that if Sec. 103.535 is to be construed as authorizing such action it is invalid as depriving defendants of the right of free speech in violation of the federal

and the state constitutions. We have held that if the picketing is conducted in violation of Sections 111.06 (2) (a) or 111.06 (2) (b), Statutes, it is done for an unlawful purpose and may be enjoined. **Retail Clerks' Union v. Wisconsin E. R. Board**, 242 Wis. 21, 6 N. W. (2d) 698; **Christoffer v. Wisconsin E. R. Board**, 243 Wis. 332, 10 N. W. (2d) 197; **Wisconsin E. R. Board v. Retail Clerks Int. Union**, 264 Wis. 189, 58 N. W. (2d) 655. The United States Supreme Court has also recognized that picketing, if conducted for an unlawful purpose, may be prohibited by state statute. **Building Service Union v. Gazzam**, 399 U. S. 532.

Sec. 111.06 (2) provides that it shall be an unfair labor practice for an employee individually or in concert with others:

“(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

“(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.”

Counsel for plaintiff contend that the picketing was conducted in violation of these provisions and therefore for an unlawful purpose. The trial judge did not find facts which would have supported a conclusion that either subdivision had been violated; he went no further than to find “that the purpose of the picketing was to induce the employees to organize and affiliate with defendant’s” (sic), and rejected a finding requested by the plaintiff as follows:

“4. That the picketing of plaintiff's premises has been engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel, or induce its employees to become members of defendant labor organizations, and for the purpose of injuring the plaintiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization.”

The testimony would not have supported a finding of the facts constituting a violation of either of the subsections. No threats were made against the plaintiff; no demands were made upon it. It does not appear that any of the defendants' representatives had even spoken to plaintiff's officers about their desire to organize its employees. There was no violence, no force and no threat of force, no disorder or physical obstruction to plaintiff's property. There was no evidence that defendants' representatives had coerced or intimidated any of plaintiff's employees in their right to join or refuse to join either of defendant unions. There was only peaceful persuasion exercised by the carrying of a banner bearing a truthful legend.

Having concluded that the picketing was not conducted for an unlawful purpose we reach the question as it was stated in **American Federation of Labor v. Swing**, 312 U. S. 321, 85 L. Ed. 855:

“Is the constitutional guaranty of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?”

The question was answered by the court in the affirmative. In that case the union had unsuccessfully tried to unionize Swing's beauty parlor. Picketing followed. Suit was brought by Swing and his employees to enjoin the

interference with the former's business. The United States Supreme Court considered that a permanent injunction granted by the state court rested on the latter's conclusion that there had been no more than "peaceful persuasion". The court said:

"We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

"Such a ban of free communication is inconsistent with the guaranty of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209, 66 L. Ed. 189, 199, 42 S. Ct. 72, 27 A. L. R. 360. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

The ruling in the **Swing** case was followed in **Bakery Drivers Local v. Wohl**, 315 U. S. 769 and **Cafeteria Em-**

ployees Union v. Angelos, 320 U. S. 293, and recognized by this court as being binding on us in **Wis. E. R. Board v. International Assoc., etc.** 241 Wis. 286, 6 N. W. (2d) 339, at 302.

These cases must be accepted as stating the settled law that a state may not constitutionally prohibit the exercise of free speech by picketing by narrowing the field of a labor dispute to include only the relationship between an employer and his employees.

Four decisions of the United States Supreme Court are cited by plaintiff as authority for its assertion that the doctrine of the **Swing** and **Wohl** cases has been limited by that court:

**Giboney v. Empire Storage & Ice Co.**, 336 U. S. 490;

**Hughes v. Superior Court**, 339 U. S. 460;

**Building Service Employees v. Gazzam**, 339 U. S. 532;

**International Brotherhood of Teamsters v. Hanke**, 339 U. S. 470;

**Local Union No. 10 v. Graham**, 345 U. S. 192.

We do not so construe them. In each of them the right of the state to enjoin picketing under the circumstances existing was recognized. They, as well as others resulting in similar holdings, have been examined by us. It would serve no useful purpose to discuss each of them and to point out in what respect it is to be distinguished in its facts from those appearing in the instant case. It is enough to say that in each of them there were circumstances which the court said demonstrated a purpose on the part of the pickets to accomplish an unlawful purpose, in most of them more than a mere effort peacefully to persuade the employees by the use of a banner to join the interested union.

By the Court: Judgment reversed and cause remanded with directions to dissolve the injunction and dismiss the complaint.

**2. First Judgment of the Wisconsin Supreme Court.**

And afterwards, to-wit, on the 28th day of June, A. D. 1955, the same being the 91st day of said term, the following proceedings were had in said cause in this court:

Waukesha Circuit Court,

Vogt, Incorporated, a Wisconsin Corporation,  
Respondent,

v.

International Brotherhood of Teamsters, Local 695,  
A. F. L., International Union of Operating Engineers,  
Local 139, A. F. L., and Building & Construction Laborers Union, Local  
392, A. F. L.,  
Appellants.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Waukesha County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the Circuit Court of Waukesha County in this cause be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to dissolve the injunction and dismiss the complaint.

**3. Second Opinion of the Wisconsin Supreme Court.**

No. 285.

August Term, 1954.

State of Wisconsin,

In Supreme Court.

Vogt, Inc., a Wisconsin Corporation,  
Respondent,

vs.

International Brotherhood of Teamsters, Local 695,  
A. F. L.; International Union of Operating Engi-  
neers, Local 139, A. F. L.; and Building  
and Construction Laborers Union,  
Local 392, A. F. L.,  
Appellants.

**Gehl, J.** (On motion for rehearing.)

We have concluded that we were in error in our original determination of the issues in this case, and, therefore, withdraw the opinion and the mandate previously entered. We are convinced that in our study of the issues presented we gave too little consideration to the fact that there are limitations upon the right of free speech, and that the prohibition of action against free speech is not intended to give immunity for every use or abuse of language. We gave insufficient notice to the fact that free speech is not the only right secured by our fundamental law, and that it must be weighed, here for instance, against the equally important right to engage in a legitimate business free from dictation by an outside group, and the right to protection against unlawful conduct which will or may result in the destruction of a business; that both the right to labor and the right to carry on business are liberty and property. We left out of calculation the rule that the court is to consider not only the established facts as they appear in the record, but that it should also give attention to the inferences reasonably and justifiably to be drawn therefrom.

In considering the right of freedom of speech it must be recognized that that right is to be evaluated with the right of the many who have no interest whatever in the relationships between the defendant unions and those whom they seek to acquire as members; that by its very nature every right is related to a duty to exercise it so as to cause a minimum of harm to another, least of all to an innocent bystander; that the right may not be considered apart from that of society to maintain order; and that one who seeks freedom may not wholly ignore his neighbor's right to it.

"The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and the power of the State to set the limits of permissible contest open to industrial combatants." **Teamsters Union v. Hanke** (1950), 339 U. S. 470, 474.

We have not found that the United States Supreme Court has ever held that the right of free speech is absolute and to be protected regardless of the effect its exercise may have upon other rights protected by the Constitution. We find no cases decided by that court in which it has been held that a state is without power to curtail the right when, in the exercise of its authority to establish and declare its public policy, it determines that such curtailment is necessary to protect the public interest and property rights. On the contrary, the court has said that:

"... since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. **Building Service Union v. Gazzam** (1950), 339 U. S. 532, 537."

In **Bakery Drivers Local v. Wohl** (1942), 315 U. S. 769, the court said:

“A state is not required to tolerate in all places . . . even peaceful picketing by an individual.”

And in a concurring opinion Mr. Justice Douglas said:

“Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.”

In **Giboney v. Empire Storage Co.** (1949), 336 U. S. 490, 502, the court, after calling attention to the importance to our society of a vigilant protection of freedom of speech, said:

“But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *Virginia Electric Co. v. Board*, 319 U. S. 533, 539; *Thomas v. Collins*, 323 U. S. 516, 536, 537, 538, 539-540. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas v. Collins*, *supra*, at 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part ini-

tiated, evidenced, or carried out by means of language, either spoken, written, or printed. See, e. g., *Fox v. Washington*, 236 U. S. 273, 277; *Chaplinsky v. New Hampshire*, 315 U. S. 568. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society."

"Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance." *Hughes v. Superior Court* (1950), 339 U. S. 460, 465-466.

Consistently with the foregoing, we said in *Retail Clerks' Union v. Wisconsin E. R. Board* (1942), 242 Wis. 21, 37, 6 N. W. 698, that:

"Peaceful picketing is now recognized as an exercise of the right of free speech and therefore lawful. (Citing cases.) However, it cannot be made the cover for concerted action against an employer in order to achieve an unlawful or prohibited object, such as to compel an employer to coerce his employees to join a union."

There is nothing in *American Federation of Labor v. Swing*, 312 U. S. 321, to support the proposition that freedom of speech includes the right by picketing to induce an employer or an employee to violate the provisions of the Wisconsin statutes, to which we shall later refer, and thus engage in an unfair labor practice and set at naught the declared public policy of the state. No statutory violation was involved in the *Swing* case. The issue was whether "the constitutional guaranty of freedom of discussion [was] infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing

merely because there is no immediate employer-employee dispute." All that was decided in that case was that such a policy does abridge the exercise of freedom of speech by peaceful picketing. The case is distinguishable from the instant case in that it did not appear in that case that the picketing was in violation of any valid statute or that it was for an unlawful purpose. See discussion of the **Swing** case in **Wisconsin E. R. Board v. Milk, etc., Union** (1941), 238 Wis. 379, 299 N. W. 31.

By enactment of sec. 111.06 (2), Stats., the legislature has declared it to be an unfair labor practice and a violation of the public policy of this state for an employee individually or in consort with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

"(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative."

Sec. 11.04 Stats., provides that:

"Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

By the provisions of subsection (3) of the statute it is made an unfair labor practice for **any person** to do any act so prohibited.

The United States Supreme Court has conceded to the states the right to prohibit the conduct defined in these statutes. In **Building Service Union v. Gazzam**, supra, the court recognized the right of the State of Washington to declare its public policy on the subject and said:

"The State of Washington has by legislative enactment declared its public policy on the subject of organization of workers for bargaining purposes. The pertinent part of this statute is set forth in the margin. The meaning and effect of this declaration of policy is found in its application by the highest court of the State to the concrete facts of the instant case. Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of employers of labor in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment."

[The statute referred to is similar to our Sec. 111.06 (2) (b).]

The question then arises whether the defendants violated Sec. 111.06 (2) (b), Stats., and thereby engaged in picketing for an unlawful purpose. The trial court refused to find, as plaintiff requested:

“That the picketing of plaintiff’s premises has been engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel, or induce its employees to become members of defendant labor organizations, and for the purpose of injuring the plaintiff in its business because of its refusal to in any way interfere with the rights of its employees to join or not to join a labor organization.”

We are of the opinion that the finding should have been made. Picketing may be more than free speech. When it is conducted, as it was in this instance, upon a rural highway at the entrance to a gravel pit where an exceedingly small number of possible or probable patrons of the owner’s business might pass and be influenced by the Union’s banner, it is more than the mere exercise of the right of free communication. One would be credulous indeed to believe under the circumstances that the Union had no thought of coercing the employer to interfere with its employees in their right to join or refuse to join the defendant Union. We have not the slightest doubt that it was the hope of the Union that the presence of pickets at plaintiff’s place of business would interfere with its operation and deprive it of delivery service, thus bringing pressure upon it to coerce its employees to join the Union.

The message carried upon the Union’s banner could not possibly have been intended for the enlightenment of plaintiff’s employees who “had been contacted by agents of the defendants for the purpose of inducing [them] to join one or more of defendant’s labor organizations, and . . . had indicated to defendant Unions’ agents that they did not desire to join any of said labor organizations, and . . . [who at the time of trial] had continued to refuse to become members of any of defendant labor organizations”, as was found by the trial court, and which finding is not attacked upon this appeal. Conducted as the picketing was upon a country road and at the scene of the operation

of a business which is ordinarily patronized by only a small part of the public, the message carried by the pickets could not have been intended for the guidance of the community. It is clear to us that its only purpose was to influence those who were engaged in transporting supplies and materials to and from plaintiff's place of business and that it was conducted in the hope that these persons would refuse to continue to serve plaintiff and thereby compel it to choose between two alternatives—permit the continuance of the picketing and suffer the consequent loss of profits and possibly of its business, or by some means or other to coerce or intimidate plaintiff's employees to join one of the Unions, and thereby violate the provisions of sec. 111.06 (2) (b) Stats.

At this point it is important to note that the court made a finding (not attacked upon this appeal):

"That the drivers of several trucking companies have refused to deliver and haul goods and materials to and from plaintiff's premises as a result and in consequence of defendants' picketing of the plaintiff's premises, resulting in great inefficiency, inconvenience, extra labor and expense, and much damage to plaintiff."

and a conclusion (also not attacked):

"That the plaintiff has suffered, and continuation of the defendants' conduct would further cause it to suffer, irreparable damage; and that the plaintiff has no adequate remedy at law."

The inference that the picketing was conducted for an unlawful purpose is inescapable.

We are of the opinion that the court should have made the finding requested by the plaintiff, and that since the facts as to which the request was made are undisputed and the inferences are only one way, we should reverse for

error in so refusing. 5 C. J. S. 802. If, however, we may not do that, we are at liberty to and should supply the finding.

In **Pappas v. Stacey** (1955), ... Me. ..., 116 Atl. (2d) 497, a case in many respects similar to this and regarding which more will be said, the Maine court supplied a similar finding and said that the rule that a trial judge's finding should not be reversed unless it clearly appears that the decision is erroneous, is not applicable in a case which involves no oral testimony. The reason for the rule to which the court refers is obvious. The appellate court must give weight to the findings of a trial court made in a contested matter upon oral testimony where the trial judge is in a position to pass on the credibility of the witnesses and the weight to be given to their testimony. He has full opportunity to observe the demeanor of the witnesses and judge their veracity—the appellate court does not. The reason for the rule disappears, however, when the appeal is presented upon no more than pleadings and affidavits, as in the case here. This court has held that a statement of a trial court denominating as a finding that which is in the nature of a legal conclusion from undisputed evidence may be disregarded by us, **Weigell v. Gregg** (1915), 161 Wis. 413, 154 N. W. 645, that a finding upon practically undisputed evidence is not as conclusive as it is in cases where there is a conflict of evidence, **Saylor v. Marshall & Ilsley Bank** (1937), 224 Wis. 511, 272 N. W. 369, that where the question presented is one of applying the law to the undisputed facts we are not bound by the trial court's findings, **Dairy Queen of Wisconsin, Inc., v. McDowell** (1952), 260 Wis. 471, 51 N. W. (2d) 34, and in **Will of Mechler** (1944), 246 Wis. 45, 55, 16 N. W. (2d) 373, we said that:

“Generally, the rule applicable to findings of fact made by the trial court does not apply where there are no disputed questions of fact because the reason

for the rule itself fails. (In a certain class of cases inferences are said to be within the rule.) The reason for the rule is that fact-finding is primarily a function of the trial court while on appeal this court deals mainly with questions of law. The position of the trial court for the determination of factual questions is obviously superior to that of the appellate court, in that the trial court has an opportunity to observe the witnesses, note their demeanor, the manner in which they testify, their intelligence or lack of it, and many other intangible things which it is impossible to place upon a court record. None of these considerations apply to a determination of a court made upon undisputed facts where the interpretation of a written instrument is under consideration. The reason for the rule failing, the rule itself fails."

We see no distinction between the case where the court is called upon to deal with or construe a written instrument and where, as here, the court is required to study only pleadings and affidavits.

**Pappas v. Stacey**, *supra*, was a case strikingly similar in its facts. There was peaceful picketing conducted for the purpose of seeking to organize non-union employees. There was no dispute between the employer and his employees. The plaintiff had suffered and would continue to suffer in his business as a result of the picketing. The court held that the picketing was conducted for an unlawful purpose, in violation of a statute which contains provisions quite similar to those with which we are concerned, and which read as follows:

"Workers shall have full freedom of association, self organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference; re-

straint or coercion by their employers or other persons . . . .”

The parties had stipulated that the picketing was conducted for the sole purpose of seeking to organize employees of the plaintiff but the court supplied the finding, as we do here, that the purpose of the picketing was to coerce the employer to bring pressure upon the employees to join the Union, and that compliance with the pressure so exerted would result in a violation of the statute as being interference with the right of the employees to choose their own representatives. The court held that the restraint of the picketing by the lower court would not abridge the right of free speech under the Federal Constitution. The court was careful to point out that although the case was one to be treated as involving an unlawful strike, the same result would have to be reached if only picketing were involved.

We quote at some length from the opinion of the court because we believe that its expression is a sufficient answer to the contention of the Union and because its language is clearly applicable to our problem. Among other things the court said:

“Under the statute . . . the employee, or worker, is protected from ‘interference, restraint or coercion by their employers or other persons . . .’ The worker must be left free from interference by employer or other persons in reaching a decision whether to join or refrain from joining a union. It follows necessarily that pressure cannot lawfully be directed against the employer to force him to interfere with the free choice of his employees. The plaintiff cannot lawfully be placed in a position where compliance with the strikers’ demands requires action in violation of the law of the State.

“This is, however, precisely what the strikers here seek to accomplish. In brief, the strike for organiza-

tional purposes is unlawful for it is by its very nature destructive of the protection for the employees provided by the statute . . .

“A coercive force is generated by the picketing to secure new members for the union. It is apparent that this force is applied to the employer to urge his employees to join the union to save his business, and to the employees to join to save their livelihood.

“In reaching for the employees, there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during noncompliance by the employees with the requests of the union . . .

“The purpose of the picketing here, that is, the immediate purpose, is solely to bring employees into Local 390. We are not interested in the ultimate form of the relations between the plaintiff and his employees . . .

“The . . . statute [to which we have referred] is a solemn declaration of the public policy of our State. It is the law, duly enacted by the Legislature, which must govern the decision in this case. Within the plain and clear meaning and intent of the statute we find, as we have indicated, a public policy against peaceful picketing at the place of business for organizational purposes. In our opinion the restraint of such picketing does not abridge the right of free speech under the decisions of the Supreme Court.”

It is worthy of note that an appeal was taken to the United States Supreme Court. There is no record of the Federal court's action except an entry in its journal, as follows:

“The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas would note probable jurisdiction.”

It would appear from this entry that the court dismissed the appeal because no federal question was presented, suggesting that the court did not consider itself bound by the rule of the **Swing** case which, when this case was first studied by us, we considered as requiring reversal.

The defendants contend that we may not be concerned with the fact that the picketing has caused a loss to plaintiff. We may concede that workmen's infliction of incidental damage to others by use of lawful methods of action in the field of labor does not warrant injunctive relief. Counsel have called our attention, however, to no authority, nor have we been able to find one, for the proposition that the courts must close their eyes to the loss where the conduct which causes the loss constitutes a violation of a statute, as we find in the case here.

We conclude that the picketing was conducted for an unlawful purpose and that, therefore, the trial court properly enjoined it.

Our decision is not to be construed as holding that the state may forbid peaceful picketing solely because there is no immediate employer-employee dispute as was held in the **Swing** case.

By the Court.—The original mandate herein is vacated and a mandate substituted affirming the judgment.

### Dissenting Opinion.

Currie, J. (dissenting). I must respectfully dissent from the majority opinion filed upon the rehearing granted in this case because neither the briefs of counsel, nor anything stated in the new opinion, convince me that our original opinion was erroneous. I would adhere to such orig-

inal opinion except in the one minor respect hereinafter mentioned.

There is much stated in the new opinion with which I fully concur, although disagreeing with the final result determined therein. Before touching upon the area of dissent it would seem advisable to list the matters as to which there is complete agreement. These are:

(1) While the wording on the signs carried by pickets constitutes the exercise of free speech, the physical presence of the pickets makes picketing something more than free speech.

(2) Because picketing does embrace more than free speech, any state has the right to regulate or prohibit the same when carried on with respect to a business, whose labor relations are not subject to federal regulation under the Taft-Hartley Act, if conducted to achieve an unlawful objective; and in exercising such right the state does not violate the provisions of the First and Fourteenth Amendments to the United States Constitution.

(3) Picketing, which is conducted for the purpose of coercing or inducing an employer in such a business to interfere with the right of his employees to join any labor organization of their own choosing, or to refrain from so doing, is for an unlawful objective in that it violates the provisions of sec. 111.06 (2) (b), Wis. Stats.

(4) Where a question of fact is presented on an appeal to this court as to whether peaceful picketing was conducted for an unlawful objective, and no parol testimony had been taken before the trial court, but instead the proof in the record consists solely of affidavits or stipulated facts, this court is not concluded by findings of the trial court based upon inferences drawn from such affidavits or stipulated facts, but is free to draw its own inferences from such record.

The trial judge in the instant case expressly found "that the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's [sic]." The request of plaintiff's counsel for an express finding, that the picketing had been carried on for the purpose of coercing or inducing the plaintiff employer to interfere with the rights of its employees to join or not join the defendant unions, was denied. Plaintiff had expressly pleaded that the picketing violated sec. 111.06 (2) (b), so that such requested finding was in keeping with such allegation. This court in its original opinion expressly determined that **"the testimony would not have supported a finding of the facts constituting a violation of either of the subsections"** [sec. 11.06 (2) (a) or 111.06 (2) (b)]. See p. 319 of the original opinion.

Plaintiff at no time pleaded that the picketing constituted a violation of sec. 111.06 (2) (a),<sup>1</sup> a fact which was again conceded in plaintiff's brief on rehearing. Therefore, for the purpose of this appeal, sec. 111.06 (2) (a) should not have been referred to in our original opinion, nor is it proper to consider its possible application on the rehearing. Plaintiff's right to an injunction restraining the picketing must stand or fall on the issue of whether the picketing violated sec. 111.06 (2) (b).

We come now to an analysis of the facts appearing in the record. No demand was ever made by or in behalf of the defendants upon the employer for union recognition or otherwise. The defendant unions had, however, made persistent efforts by personal solicitation to induce plaintiff's

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<sup>1</sup> Sec. 111.06 (2) (a), Stats., reads:

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family."

employees to join the defendant unions, which efforts failed. These efforts to organize were then followed by the peaceful picketing. The drivers of trucks of other employers refused to cross the picket line to haul plaintiff's product or to make delivery of materials to plaintiff's gravel pit, thereby causing damage to the plaintiff.

As pointed out in the majority opinion, the picketing was conducted at a spot out in the country where there was little travel by the public. This permits of the reasonable inference that the picketing was not for the purpose of disseminating information to the general public. The two remaining conceivable objectives are: (1) to attempt to induce plaintiff's employees to join the defendant unions; or (2) to coerce the plaintiff employer into taking some affirmative action of a coercive nature to induce its employees to join the defendant unions. It is only if the last of these two alternatives is found to be the purpose of the picketing that an injunction may be entered restraining the picketing because plaintiff so limited the issue by its pleadings and its contentions in the trial court.

The mere fact that some damage resulted to the plaintiff employer from the picketing does not establish that the picketing was for an unlawful purpose. **Wisconsin E. R. Board v. Retail Clerks Int. Union** (1953), 264 Wis. 189, 194, 58 N. W. (2d) 655. The facts that the defendants prior to the picketing had attempted by personal solicitation to induce the employees to join the defendant unions while no demand whatsoever was ever made upon the plaintiff employer, strongly supports the inference drawn by the learned trial judge that the picketing was for the purpose of inducing some conduct on the part of the employees. This seems to me to be a more reasonable inference than that its objective was to cause the employer to engage in the unlawful activity prohibited by sec. 111.06 (2) (b).

The inference which the majority of the court draws from these acts of solicitation of the employees prior to the picketing runs exactly counter to the reasoning of the Missouri court in **Bellerive Country Club v. McVey** (Mo., 1955), 284 S. W. (2d) 492. In that case, as in the instant case, the plaintiff employer sought to enjoin peaceful picketing on the ground that its objective was to seek to coerce the employer to take action to force its employees into the union doing the picketing, thereby rendering such objective unlawful under Missouri law. About a year prior to the picketing the union contacted the plaintiff country club and asked permission to come upon the club's property to talk to the employees in order to induce them to join the union. This request was denied. In the year which ensued between such request and the picketing, the union made no attempt to contact the employees in any way to induce them to join. The picketing was instituted on the opening day of the Western Open Golf Tournament at the club and as a result deliveries of such items as beer and soft drinks were immediately cut off because of the refusal of truck drivers to cross the picket line, and a union orchestra refused to play at a scheduled club dance. One of the reasons advanced by the Missouri court, in holding that the picketing was for an unlawful objective, was the failure of the union to have undertaken any solicitation of the employees for union membership prior to the picketing. The majority opinion in the instant case, on the other hand, bases its inference of unlawful objective (to cause the plaintiff employer to take action to force its employees into the defendant unions) on the fact that the unions had prior to the picketing solicited the employees for membership but such prior organizing activities had been unsuccessful.

It is elementary that the burden of proving an unlawful purpose in the instant case is upon the plaintiff. 20 Am. Jur., Evidence, p. 1043, sec. 1189, states:

“To establish a theory by circumstantial evidence, the known facts relied upon as a basis for the theory must be of such nature and so related to each other that the only reasonable conclusion to be drawn therefrom is the theory sought to be established. **A fact is not proved by circumstances if they are merely consistent with its existence or if other inferences may reasonably be drawn from the facts in evidence.**” (Emphasis supplied.)

Applying the above stated principle to the instant case, I feel that this court should uphold the inference drawn by the trial court, viz., that the objective of the picketing was for organizational purposes to induce the employees to join the defendant unions.

There is an even more compelling reason why an injunction should not be grounded in this case on any application of the provisions of sec. 111.06 (2) (a) than the fact that such issue was not raised in the trial court or in this court until the motion for rehearing. Such further reason is that there is a grave doubt as to whether peaceful organizational picketing conducted at a place of employment solely for the purpose of inducing employees to join a union can ever be held to constitute a violation of sec. 111.06 (2) (a). To seek to induce employees to join a union is a **lawful objective**. In order for this court to hold that peaceful organizational picketing may be prohibited as a violation of sec. 111.06 (2) (a), it, therefore, necessarily follows that we would have to find that **the means and not the objective was unlawful**.

Thus far the United States Supreme Court has only upheld the right of a state to prohibit peaceful picketing when the picketing was conducted for an **unlawful objective**. It has never held that peaceful picketing may be enjoined as an **unlawful means to attain a lawful objective**.

The dismissal by that court of the appeal from the judgment of the Maine court in **Pappas v. Stacey** (Me., 1955), 116 Atl. (2d) 497, cannot be construed as upholding the right of a state to prohibit peaceful organizational picketing. In the **Pappas case**, three employees of the plaintiff employer had gone on strike in an attempt to induce the employer to recognize the union and joined in the picketing. This in itself afforded adequate proof that the picketing had the unlawful objective of seeking to cause the employer to take action to coerce his employees into joining the union and the court so held. In addition, the court also held that even if the picketing were solely for organizational purposes it could be enjoined. Thus the decision found that the picketing could be enjoined on two grounds, the first of which had been upheld by prior decisions of the United States Supreme Court, and the second of which has not been.

The United States Supreme Court does not consider that an appeal presents a substantial federal question if the issue raised has been directly passed upon in its prior decisions. Stern & Gressman, *Supreme Court Practice* (2d), p. 81, and **Palmer Oil Corp. v. Amerada Corp.** (1952), 343 U. S. 390, 72 Sup. Ct. 842, 96 L. Ed. 1022. Such court also will not review a state court judgment based upon two or more grounds, one of which presents no substantial federal question. Stern & Gressman, p. 94, G, and note in 95 U. of Pa. L. Rev. (1947) 764, entitled "Supreme Court Review of State Court Decisions Involving Multiple Questions."

Because of the gravity of the problem of whether peaceful organizational picketing may be enjoined as a violation of sec. 11:06 (2) (a), this court should not pass on such question until the issue has been properly raised in the trial court and the issue has been fully briefed and argued here. Neither was done in the instant case.

**4. Second Judgment of the Wisconsin Supreme Court.**

And afterwards, to-wit, on the 7th day of February, A. D. 1956, the same being the 50th day of said term, the following proceedings were had in said cause in this Court:

Vogt, Incorporated, a Wisconsin Corporation,  
Respondent,

v.

International Brotherhood of Teamsters, Local 695 A. F. L.,  
International Union of Operating Engineers, Local  
139, A. F. L., and Building & Construction  
Laborers Union, Local 392, A. F. L.,  
Appellants.

This cause came on to be heard on the reargument heretofore ordered herein and was reargued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the original mandate filed herein on June 28th, 1955, be, and the same is hereby, vacated, and a mandate substituting affirming the judgment of the Circuit Court of Waukesha County.

Justice Currie dissents.

DEC 31 1956

JOHN T. FEY, Clerk

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1956.

No. 79.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL  
695, A. F. L.; INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 139, A. F. L.; and BUILDING & CON-  
STRUCTION LABORERS UNION, LOCAL 392, A. F. L.,  
Petitioners,

v.

VOGT, INC.,  
Respondent.

On Writ of Certiorari to the Supreme Court  
of Wisconsin.

**BRIEF FOR THE PETITIONERS.**

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1956.

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No. 79.

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL  
695, A. F. L.; INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 139, A. F. L.; and BUILDING & CON-  
STRUCTION LABORERS UNION, LOCAL 392, A. F. L.,  
Petitioners,

v.

VOGT, INC.,  
Respondent.

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On Writ of Certiorari to the Supreme Court  
of Wisconsin.

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**BRIEF FOR THE PETITIONERS.**

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**OPINIONS BELOW.**

The memorandum opinion of the Circuit Court of Waukesha County, Wisconsin (R. 1-2) is unreported. The original opinion of the Wisconsin Supreme Court (R. 22-28) is reported in 270 Wis. 315; 71 N. W. 2d 359. The rehearing opinion (R. 30-46) is reported in 270 Wis. 321a, 74 N. W. 2d 749.

## **JURISDICTION.**

The Wisconsin Supreme Court, on June 28, 1955, entered a mandate reversing the judgment of the Circuit Court for Waukesha County (R. 28). A motion for rehearing was filed by the Respondent herein on July 18, 1955 (R. 28) and was granted on October 5, 1955 (R. 29). On February 7, 1956, the Wisconsin Supreme Court withdrew its original mandate and affirmed the judgment of the Circuit Court (R. 41). The instant petition was filed on May 4, 1956, and was granted October 8, 1956 (R. 47). The jurisdiction of this Court rests on 28 U. S. C. 1257 (3).

## **QUESTION PRESENTED.**

Whether peaceful picketing, having as its purpose the publication of the facts of a labor dispute and the organization of non-union employees, preceded by solicitation of such non-union employees and conducted on a town road bordering the situs of the dispute, and which is unaccompanied by demands of any kind upon the employer, is protected under the First and Fourteenth Amendments to the Constitution of the United States.

## **CONSTITUTIONAL PROVISIONS INVOLVED.**

### **First Amendment.**

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

## Fourteenth Amendment.

### Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### STATEMENT.

The facts in this case, all of which are undisputed, are as follows: Respondent, Vogt, Inc. (hereinafter referred to as "Vogt") operates a gravel pit in the Town of Oconomowoc, Waukesha County, Wisconsin (R. 3; 12, 16), employing ten to fifteen men (R. 5, 16). In the fall of 1953 (R. 9) and again in April of 1954 (R. 8, 10, 11) representatives of the Petitioners (hereinafter referred to as the "Unions") discussed the advantages of union affiliation with several of Vogt's employees and solicited their membership (R. 5, 8-11, 12, 16). Vogt's employees declined the Unions' offer of membership and indicated a desire to remain non-union (R. 5, 16).

The Unions commenced peaceful picketing on a public road bordering Vogt's gravel pit, where such employees worked, on July 13, 1954 (R. 4, 12, 16). The sign carried by the picketers stated:

"The men on this job are not 100% affiliated with the A. F. of L." (R. 4, 12, 16).

No demands of any kind were made upon Vogt and the picketing was at all times peaceful (R. 25).

Some truck drivers refused to make deliveries through the picket line, as a result of which Vogt was required to use his own trucks (R. 5, 16). It was stipulated between the parties that the present record contains all of the facts and evidence which could be adduced upon a trial on the merits (R. 20).

Vogt filed a complaint in the Waukesha County Circuit Court demanding that a permanent injunction be issued against the picketing. It was alleged in the complaint that the picketing was for the unlawful purpose of compelling Vogt to interfere with its employees' right of self-organization (R. 5-6); and that the picketing was unlawful because no labor dispute, as defined by state statute,<sup>1</sup> existed (R. 6).

The Unions' answer denied that the picketing was being carried on for an unlawful purpose (R. 12). It was affirmatively alleged that a labor dispute existed between the Unions and the non-union employees of Vogt and that the Unions' activities were for a lawful purpose, protected under the First and Fourteenth Amendments of the Federal Constitution (R. 14).

<sup>1</sup> Wis. Stat., Sec. 103.535 (1953), provides:

"It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employees, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of Section 103.62, exists between such employer and his employees or their representatives."

Wis. Stat., Sec. 103.62 (3) (1953), provides:

"The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith." (Emphasis ours.)

The circuit court found that the purpose of the picketing was to induce Vogt's employees to affiliate with the picketing Unions (R. 16); it refused to find that the picketing was being conducted for an unlawful purpose (R. 1). A permanent injunction restraining all peaceful picketing was nevertheless issued on November 9, 1954 (R. 18-19), because no labor dispute as defined by state law existed.

The court below, in a unanimous opinion rendered on June 28, 1955, affirmed the circuit court's finding of fact; and stated that a finding of unlawful purpose could not be made on the facts found by the circuit court (R. 25). It therefore held that under the decision of this Court in **A. F. of L. v. Swing**, 312 U. S. 321, the Unions' activities were constitutionally protected and could not be enjoined (R. 26-27). The judgment of the circuit court was accordingly reversed with directions to dissolve the injunction and dismiss the complaint (R. 28).

On October 5, the court below granted a motion for rehearing filed by Vogt (R. 28-29). Although no additional evidence was introduced, the court below, on February 7, 1956, withdrew its original opinion and mandate and affirmed the judgment of the circuit court (R. 41).

The court below reasoned that the picketing was not directed at Vogt's employees because their membership has been previously solicited. It assumed that only a small part of the public travelled the road in question, concluding from this that the picketing was not directed at the general public. At this juncture, it became "clear" to the court below that the "only" purpose of the picketing was to "influence" those delivering materials to Vogt's gravel pit in the "hope" that they would refuse to serve Vogt (R. 36). Vogt's only choice, concluded the court below,

<sup>2</sup> The Circuit Court relied exclusively on the statutory provisions reproduced in Note 1, *supra* (R. 1-2, 16-17).

was to suffer a loss of profits or interfere with its employees' right of self-organization. On this basis, the court reversed its own and the circuit court's findings to the contrary, withdrew its earlier unanimous decision, and, with one judge dissenting, the circuit court's judgment granting a permanent injunction was affirmed.<sup>3</sup>

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<sup>3</sup> The Unions were permanently enjoined and restrained:

"(a) From directly or indirectly establishing and maintaining, or causing to be established or main- [fol. 27] tained, any pickets or patrols in front of plaintiff's entrance ways, drive-ways, on private and public roads leading to plaintiff's business establishment, and generally at or near plaintiff's establishment located in the Town of Oconomowoc, Waukesha County, State of Wisconsin.

"(b) From displaying or causing to be displayed, anywhere at or near plaintiff's business establishment or on the roads and highways leading thereto, any signs or placards bearing the legend or legends as described in the complaint herein, or stating or intending to cause to be understood that there is a labor dispute in existence between the plaintiff and its employees, or between the plaintiff and any of the defendants.

"(c) From inducing or persuading, or causing others to induce or persuade, trucking, cartage and other transportation companies and their officers, agents and employees to decline to deliver, haul or transport goods and supplies to and from the plaintiff's business establishment" (R. 19).

## SUMMARY OF ARGUMENT.

In this case, the task is one of applying settled principles of law to undisputed facts. Such a record should be treated as presenting a question of law. **Dennis v. United States**, 341 U. S. 494, 515. But if the question be considered one of fact, this Court must nevertheless undertake an independent examination of the record. **Drivers Union v. Meadowmoor Co.**, 312 U. S. 287, 293. This for the reason that the Unions' timely claim to First Amendment protection is dependent upon the conclusion to be drawn from the undisputed facts in this case.

In the United States freedom of expression is the rule, restraint the exception. Legislative or judicial action restraining freedom of speech can be defended only on the ground that an exception obtains in the given case. Certainly, no deference to the findings of a state court should be accorded in cases presenting a substantial claim to First Amendment guarantees. **Thomas v. Collins**, 323 U. S. 516, 529-30.

Peaceful picketing has been uniformly held to be a constitutionally protected mode of communication since the decision of this Court in **Senn v. Tile Layers Union**, 301 U. S. 468, 478. The only cases in which restraint has been permitted by this Court involved violent picketing, picketing accompanied by unlawful demands upon an employer, and picketing having no economic nexus with the labor dispute. None of these exceptions are applicable in the instant case for the picketing in the case at bar was peaceful, unaccompanied by demands of any kind, and occurred at the site of the dispute.

The principal activities engaged in by the Unions, solicitation and peaceful picketing, are rights guaranteed under the First and Fourteenth Amendments. The only inference which has any logical connection with these proven facts

is that the Unions wanted the non-union employees to affiliate with them. Furthermore, it makes a mockery of constitutionally protected rights to predicate, as the court below did, a finding of unlawful purpose upon their exercise.

Whether many or few would have occasion to observe the picketers is totally irrelevant. The right to speak freely is not dependent upon a traffic count test. Insofar as the size of a speaker's audience is relevant, this Court has indicated that only when the size of the audience is artificially **increased** restraint may be appropriate. Compare: **Kovacs v. Cooper**, 336 U. S. 77, with **Saia v. New York**, 334 U. S. 558.

Incidental economic loss which may have occurred in no way aids those having the burden of proving that the peaceful picketing was for an unlawful purpose. Economic loss is germane to the right to initiate an action in the courts, not to the question of whether the burden of proof has been sustained.

Since the record is devoid of either allegation or proof that a single unlawful act was committed or demand made by the Unions, Vogt did not begin to meet its heavy burden of demonstrating that the picketing was for an unlawful purpose. The inferences drawn by the court below were, in every sense of the words, insubstantial and spurious.

The constitutional right to engage in peaceful picketing, irrespective of a dispute between an employer and his employees, was expressly affirmed by this Court in **Bakery Drivers Local v. Wohl**, 315 U. S. 769, and **A. F. of L. v. Swing**, 312 U. S. 321. We believe the decisions in the **Swing** and **Wohl** cases to be dispositive of the question here presented. Those decisions should be re-affirmed and the judgment of the court below reversed.

## ARGUMENT.

- I. **This Court Is Not Bound by the Conclusion of the Court Below That the Peaceful Picketing at the Situs of the Dispute Was to Accomplish an Unlawful Purpose; But, Rather, Has the Power and Duty to Make Its Own Findings When, as Here, Petitioners' Constitutional Rights Depend Upon Conclusions Drawn From Undisputed Evidentiary Facts.**

The trial court and seven justices of the Wisconsin Supreme Court in their first opinion made the unqualified finding that the peaceful picketing was for a lawful purpose. On rehearing, six of the Wisconsin Supreme Court justices, on the identical record, changed their minds and favored the imputation of sinister motivations. Expressed in another way, out of a total of fifteen judicial votes cast during the course of the litigation below, only six votes were cast in favor of a finding of unlawful purpose while nine votes had previously been cast in favor of a finding of lawful purpose.<sup>4</sup> Yet the Unions stand before this Court permanently restrained from publicizing, through the medium of peaceful picketing, the undisputed fact that the employees of Vogt are non-union. Whether this restraint impairs the freedom of speech guaranteed by the Federal Constitution is the question before this Court.

- A. **The Finding of the Court Below With Respect to Purpose Should Be Treated as a Conclusion of Law.**

Without exception, the evidentiary components of the record are undisputed; hence, no question of fact, as that term is traditionally used, is presented in this case. An

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<sup>4</sup> Compare *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 500, 600, with *Baumgartner v. United States*, 322 U. S. 665, 670, for a treatment of concurring findings by lower courts. It must be noted, however, that in this case confusion rather than concurrence reigned in the courts below.

" 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights." **Watts v. Indiana**, 338 U. S. 49, 51. See also: **Baumgartner v. United States**, 322 U. S. 665, 670-71; Morris, **Law and Fact**, 55 Harv. L. Rev. 1303, 1329 (1942). A finding of unlawful purpose, as much as a finding of clear and present danger, bears "the marks of a 'question of law.' " **Dennis v. United States**, 341 U. S. 494, 515. Therefore, there is no merit to any suggestion that this Court is bound by the findings of the court below as to the purpose of the Unions' picketing.

**B. If the Finding With Respect to Purpose Is Treated Here as a Finding of Fact, Such Finding Is Nevertheless Subject to Independent Review and Evaluation by This Court.**

Even if the question be considered one of fact (See: **Norris v. Alabama**, 294 U. S. 587, 589-90) it is subject to full review in this court. As stated in **Fiske v. Kansas**, 274 U. S. 380, 385-86:

"... this court will review the findings of fact by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts."

Similarly, this Court stated in **Drivers Union v. Meadowmoor Co.**, 312 U. S. 287, 293:

"[It] is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the

ultimate power to search the records in the state courts where a claim of constitutionality is effectively made."

This Court frequently has been required to make an independent evaluation of the certified record in order to determine whether a denial of federally-protected rights has occurred:

Abridgment of voting rights: **Smith v. Allwright**, 321 U. S. 649, 662.

Coerced confessions, e. g.: **Haley v. Ohio**, 332 U. S. 596, 599; **Malinski v. New York**, 324 U. S. 401, 404; **Ashcraft v. Tennessee**, 322 U. S. 143, 148.

Coerced tax payments: **Ward v. Love County**, 253 U. S. 17, 22-23.

Confiscatory tax rate: **United Gas Public Service Co. v. Texas**, 303 U. S. 123, 143.

Contempt convictions: **Craig v. Harney**, 331 U. S. 367, 373; **Pennekamp v. Florida**, 328 U. S. 331, 335; **Bridges v. California**, 314 U. S. 252, 270-71.

Criminal syndicalism convictions: **Herndon v. Lowry**, 301 U. S. 242, 249, 259-61; **Fiske v. Kansas**, 274 U. S. 380, 385-86.

Discrimination in the selection of juries, e. g.: **Hernandez v. Texas**, 347 U. S. 475, 480-81; **Pierre v. Louisiana**, 306 U. S. 354, 358; **Norris v. Alabama**, 294 U. S. 587, 589-90.

Disorderly conduct conviction: **Niemotko v. Maryland**, 340 U. S. 268, 271-72. See also: **Terminiello v. Chicago**, 337 U. S. 1, 6.

Effect of foreign decree: **United States v. Pink**, 315 U. S. 203, 217-18.

Exemption from state taxation: **Hoover & Allison Co. v. Evatt**, 324 U. S. 652, 659; **Great Northern R. Co. v. Washington**, 300 U. S. 154, 166; **Johnson Oil Ref. Co. v. Oklahoma**, 290 U. S. 158, 159-60; **First Nat. Bank v. Hartford**, 273 U. S. 548, 552.

Existence of a contract, e. g.: **Indiana ex rel. Anderson v. Brand**, 303 U. S. 95, 100; **United States Mortg. Co. v. Matthews**, 293 U. S. 232, 236-37; **Coolidge v. Long**, 282 U. S. 582, 597.

Full faith and credit: **Adam v. Saenger**, 303 U. S. 59, 64.

Labor dispute statute violating due process of law: **Truax v. Corrigan**, 257 U. S. 312, 324.

Peonage law: **Pollack v. Williams**, 322 U. S. 4, 13.

Purpose of picketing: **Plumbers Union v. Graham**, 345 U. S. 192, 197.

Religious as distinguished from commercial nature of publications: **Follett v. McCormick**, 321 U. S. 573, 576-78; **Jamison v. Texas**, 318 U. S. 413, 416; Cf. **Jones v. Opelika**, 316 U. S. 584, 598; **Largent v. Texas**, 318 U. S. 418, 422.

Tariff rates: **Kansas City Southern R. Co. v. C. H. Albers Commission Co.**, 223 U. S. 573, 591.

Violation of alien property laws: **Oyama v. California**, 332 U. S. 633, 638-40; **Morrison v. California**, 291 U. S. 82, 90, 94.

Violent picketing: **Milk Wagon Drivers v. Meadowmoor Dairy Co.**, 312 U. S. 287, 293-94.

See also: **The Federal Courts and the Federal System**, Hart & Wechsler, pp. 465-73, 527-47 (1953); Note, 55 Harv. L. Rev. 644 (1942).

And where, as here, the facts are undisputed<sup>5</sup> this Court "must analyze the facts . . . and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard." **Truax v. Corrigan**, 257 U. S. 312, 324. See also: **Craig v. Harney**, 331 U. S. 367, 375; **Pennekamp v. Florida**, 328 U. S. 331, 335, 368; **Bridges v. California**, 314 U. S. 252, 274, 278; **Pierre v. Louisiana**, 306 U. S. 354, 360; **Herndon v. Lowry**, 301 U. S. 242, 249; **Fiske v. Kansas**, 274 U. S. 380, 386.

But whether the question presented by this record be considered one of fact, law or mixed is not controlling. It is a mere truism to state that picketing for an unlawful purpose may be enjoined; that coerced confessions may not be used; or that systematic exclusion of Negroes from a jury will void a conviction. In all of these cases, and in many others, the substantive right guaranteed by the Federal Constitution is ultimately dependent upon the conclusion drawn from facts which are frequently undisputed. In such cases, this Court must independently decide whether a denial, either express or in substance, of constitutional right has occurred.

## II. Whatever Presumptions May Favor State Action in the Ordinary Case, Such Presumptions Are Inapplicable When a Substantial Claim to First Amendment Rights Is Raised.

Considerations of policy springing from our federal system and from our constitutional separation of powers

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<sup>5</sup> The court below, in reversing the trial court's finding that the picketing was for organizational purposes, concluded *a de novo* determination of the Unions' purpose was permissible. This for the reason "that where the question presented is one of applying the law to the undisputed facts we are not bound by the trial court's findings" (R. 37). With equal force it follows that the Unions' purpose can be "as readily determined here as in a state court." Compare: *Adam v. Saenger*, 303 U. S. 59, 64. See also: Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 121-22.

have been crystallized in the rule that a statute is presumed to be constitutional. The presumption is a rebuttable one of fact. But not infrequently contravailing considerations of equal importance operate to exclude the use of this presumption. Particularly, though not exclusively, in cases involving the First Amendment has an equivalency been expressed:

"[Doubts] and difficulties \* \* \* arise frequently when this Court is obliged to give definiteness to 'the vague contours' of Due Process or, to change the figure, to spin judgment upon State action out of that gossamer concept."

**Haley v. Ohio**, 332 U. S. 596, 602 (Frankfurter, J., concurring). But "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule."

**Burstyn v. Wilson**, 343 U. S. 495, 503. "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties—the phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of these rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties." **Schneider v. Irvington**, 308 U. S. 147, 161.

Solicitous concern for the liberties of speech and press has caused this Court to state that freedom of speech is in a "preferred position";<sup>6</sup> its restraint is the "exception rather than the rule";<sup>7</sup> it is to be "guarded with a jealous

<sup>6</sup> *Kovacs v. Cooper*, 336 U. S. 77, 88; *Saia v. New York*, 334 U. S. 558, 561; *Marsh v. Alabama*, 326 U. S. 501, 509, 510; *Follett v. McCormack*, 321 U. S. 573, 575; *Murdock v. Pennsylvania*, 319 U. S. 105, 115.

<sup>7</sup> *Herndon v. Lowry*, 301 U. S. 242, 258; *Burstyn v. Wilson*, 343 U. S. 495, 503.

eye";<sup>8</sup> "mere legislative preferences" may not suffice when the First Amendment guarantees are involved;<sup>9</sup> and that in "borderline instances" the doubt is to be resolved in favor of freedom of speech.<sup>10</sup> We do not understand these indications of constitutional stewardship to mean that a statute touching upon freedom of speech is presumptively invalid or that the First Amendment is more important than other portions of the Bill of Rights. But they do indicate that a presumption necessarily exists in favor of the exercise of these freedoms. And when a legislative policy abridging the freedoms of speech and press is before the bar of this Court, it must stand or fall on its merits, without reliance upon the presumption of constitutionality. **Thomas v. Collins**, 323 U. S. 516, 529-30; **United States v. C. I. O.**, 335 U. S. 106, 140 (concurring opinion). See also: **West Virginia State Bd. v. Barnette**, 319 U. S. 624, 639; Lusk, **Minority Rights and the Public Interest**, 52 Yale L. J. 1, 19-20 (1942); Note, 40 Col. L. Rev. 531 (1940). Substantially the same view has also been expressed in cases dealing with state tax statutes which purport to levy a tax, in excess of the costs of inspection, upon imports and exports. **Great Northern R. Co. v. Washington**, 300 U. S. 154, 163, 168; **D. E. Foote & Co. v. Stanley**, 232 U. S. 494, 503. Cf. **Bailey v. Drexel Furniture Company**, 259 U. S. 20, 37-38.

The rule could hardly be otherwise: Unless the exercise of constitutionally guaranteed rights and immunities is presumptively favored, one seeking to exercise those rights in face of a limiting statute would be forced to overcome

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<sup>8</sup> *A. F. of L. v. Swing*, 312 U. S. 321, 325.

<sup>9</sup> *American Communications Assn. v. Douds*, 339 U. S. 382, 400; *West Virginia State Bd. v. Barnette*, 319 U. S. 624, 639; *Thornhill v. Alabama*, 310 U. S. 88, 95-96; *Schneider v. Irvington*, 308 U. S. 147, 161; *U. S. v. Carolene Products*, 304 U. S. 144, 152n.

<sup>10</sup> *Pennkamp v. Florida*, 328 U. S. 331, 347; *Craig v. Harney*, 331 U. S. 367, 373.

a presumption in favor of the restraint. Thus, without a presumption in favor of freedom of speech, restraint would become the rule rather than the exception. We believe, however, that the decisional history of this Court has firmly established freedom of expression as the rule and that a statute abridging free speech must be defended, if it can be defended, on its merits.

It is true that in this case the challenge is not to legislative power; rather the Unions here challenge the correctness of a judicial decision which was based upon the record now before this Court. Nevertheless, what has been said with regard to the position of free speech in relation to statutory action applies with greater force to the judicial action in the case at bar. For, when the restraint is imposed by judicial decision rather than legislative act, such a judgment does not come here "encased in the armor wrought by prior legislative deliberation." **Bridges v. California**, 314 U. S. 252, 261.

The fundamental importance of "[peaceful] picketing [which] is the workingman's means of communication" (**Drivers Union v. Meadowmoor Co.**, 312 U. S. 287, 293) to our industrial society cannot be doubted at this late date. Hence, restraints upon the "workingman's means of communication" should be the exception rather than the rule. Those who would sanction restraint have "a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case." **Burstyn v. Wilson**, 343 U. S. 495, 504. Nothing less than a "solidity of evidence should be required" if the Unions are to be deprived of the right to peaceful picketing. **Pennekamp v. Florida**, 328 U. S. 331, 347.<sup>11</sup> We believe that the record in the

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<sup>11</sup> Here as in the *Pennekamp* case there was a verified denial of unlawful purpose. Such a denial operates as a "complete refutation of the charge." *Ladd v. Ladd*, 8 Howard (U. S.) 10, 28. Therefore, Vogt was obligated to demonstrate the alleged unlawful purpose "by a solidity of evidence . . . which would be difficult to find in this record." *Pennekamp v. Florida*, 328 U. S. 331, 347.

present case fails to afford evidence even tending to support a finding of unlawful purpose, let alone "a solidity of evidence," supporting such a conclusion.

### III. This Court Has Consistently Held That Peaceful Picketing, at the Site of a Labor Dispute, in the Absence of Unlawful Demands, Is Protected Free Speech Under the First and Fourteenth Amendments.

"The First Amendment draws no distinction between the various methods of communicating ideas." **Superior Films v. Dept. of Education**, 346 U. S. 587, 589 (Douglas, J., concurring). Speeches,<sup>12</sup> door-to-door religious solicitations,<sup>13</sup> religious solicitations in privately<sup>14</sup> or governmentally owned towns,<sup>15</sup> union solicitations,<sup>16</sup> pamphlets,<sup>17</sup> a flag,<sup>18</sup> motion pictures,<sup>19</sup> and peaceful picketing,<sup>20</sup> all serve as vehicles of communication. For this reason each is entitled to the Constitution's protection.

We are here concerned with peaceful picketing which has been uniformly recognized by this Court since **Senn v. Tile Layers Union**, 301 U. S. 468, 478, as a means of pub-

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<sup>12</sup> *Kunz v. New York*, 340 U. S. 290; *Niematko v. Maryland*, 340 U. S. 268; *Terminiello v. Chicago*, 337 U. S. 1.

<sup>13</sup> *Martin v. Struthers*, 319 U. S. 141; *Cantwell v. Connecticut*, 310 U. S. 296.

<sup>14</sup> *Marsh v. Alabama*, 326 U. S. 301.

<sup>15</sup> *Tucker v. Texas*, 326 U. S. 517.

<sup>16</sup> *Thomas v. Collins*, 323 U. S. 516.

<sup>17</sup> *Largent v. Texas*, 318 U. S. 418; *Jamison v. Texas*, 318 U. S. 413; *Schneider v. Irvington*, 308 U. S. 147.

<sup>18</sup> *West Virginia State Bd. v. Barnette*, 319 U. S. 624; *Stromberg v. California*, 283 U. S. 359.

<sup>19</sup> *Superior Films v. Dept. of Education*, 346 U. S. 587; *Gelling v. Texas*, 343 U. S. 960; *Burstyn v. Wilson*, 343 U. S. 495.

<sup>20</sup> "Peaceful picketing is the workingman's means of communication." *Drivers Union v. Meddowmoor Co.*, 312 U. S. 287, 293.

licizing the facts of a labor dispute which is entitled to the First Amendment's protection.<sup>21</sup> In **Carlson v. California**, 310 U. S. 106, 112-13, this Court said:

"The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. \* \* \* [Publicizing] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state."

It is, of course, acknowledged that the right to engage in picketing is not absolute.<sup>22</sup> Picketing enmeshed with violence as in **Drivers Union v. Meadowmoor**, 312 U. S. 287 and **Hotel Employees' Local v. Board**, 315 U. S. 437, affords the clearest situation in which restraint may be proper. Peaceful picketing at a place having no economic nexus with the labor dispute has not been accorded constitutional protection. - **Carpenters Union v. Ritter's Cafe**, 315 U. S. 722. Nor has picketing having as its avowed purpose the violation of important state policies been held

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<sup>21</sup> Some of the more scholarly works on peaceful picketing include: Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180 (1942); Dodd, *Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513 (1943); *Picketing and Free Speech: A Reply*, 56 Harv. L. Rev. 532 (1943); Tanenhaus, *Picketing as a Tort*, 14 U. Pitt. L. Rev. 170 (1953); *Tanenhaus, Picketing—Free Speech*, 38 Cornell L. Q. 1 (1952). An excellent, though more general, treatment of the right to free speech is to be found in *Free Speech in the United States*, Zechariah Chaffee, Jr. (1941).

<sup>22</sup> Since picketing in some circumstances may be more than free speech, this Court has sanctioned its restraint when either the manner or purpose of the picketing is unlawful. Compare *Near v. Minnesota*, 283 U. S. 697, 713, 721, with *Hughes v. Superior Court*, 339 U. S. 460, 465-66.

to be beyond restraint. **Plumbers Union v. Graham**, 345 U. S. 192; **Building Service Union v. Gazzam**, 339 U. S. 532; **Teamsters Union v. Hanke**, 339 U. S. 470; **Hughes v. Superior Court**, 339 U. S. 480; **Giboney v. Empire Storage Co.**, 336 U. S. 490. But it must be here emphasized that each of the cases in the group last mentioned presented a record in which affirmative evidence of the unlawful goal appeared.

Of course, the very existence of exceptions serves to re-affirm the rule condemning blanket proscriptions of the right to engage in peaceful picketing. **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106. Equally settled is the principle—embodied in both the Norris-LaGuardia Act<sup>23</sup> and the Labor Management Relations Act<sup>24</sup>—that peaceful picketing may not be restrained merely because the labor dispute does not involve an employer and his employees. **Cafeteria Union v. Angelos**, 320 U. S. 293; **Bakery Drivers Local v. Wohl**, 315 U. S. 769; **A. F. of L. v. Swing**, 312 U. S. 321.

Since restraint of peaceful picketing conducted at the site of the dispute has been permitted by this Court only when the record before this Court affirmatively demonstrated the goal of the picketing to be contrary to an important state policy, we turn now to an analysis of the facts and the Wisconsin Supreme Court's opinion in this case.

#### IV. The Undisputed Evidentiary Facts Cannot Support a Finding of Unlawful Purpose.

The crucial facts are easily stated. The Unions solicited the membership of some of Vogt's non-union employees (R. 5, 8-11, 12; 16). The employees declined this offer (R. 5, 16). Thereafter peaceful picketing was commenced on

<sup>23</sup> 29 U. S. C. 113 (c).

<sup>24</sup> 29 U. S. C. 152 (9).

a public road bordering their place of employment (R. 4, 12, 16). The picket sign proclaimed the non-union status of these employees (R. 4, 12, 16). Their employer was inconvenienced because some truck drivers refused to deliver to a non-union plant; however, Vogt used his own trucks to make deliveries (R. 5, 16). On these facts the court below concluded that the purpose of the picketing was to compel Vogt to interfere with his employees' right of self-organization.

In its original, unanimous opinion, the court below had little difficulty in concluding that:

**"The testimony would not have supported a finding of the facts constituting a violation of either of the subsections [Wis. Stat., Sec. 111.06 (2) (a-b)]. No threats were made against the plaintiff; no demands were made upon it. It does not appear that any of the defendants' representatives had even spoken to plaintiff's officers about their desire to organize its employees. There was no violence, no force and no threat of force, no disorder or physical obstruction to plaintiff's property. There was no evidence that defendants' representatives [fol. 36] had coerced or intimidated any of plaintiff's employees in their right to join or refuse to join either of defendant unions. There was only peaceful persuasion exercised by the carrying of a banner bearing a truthful legend" (R. 25). (Emphasis ours.)**

A considerably more elaborate opinion on rehearing was required to spin out of the simple facts of this case a finding of sinister purpose.<sup>25</sup>

The crux of the reasoning in the rehearing opinion rendered by the court below is as follows: the "message car-

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<sup>25</sup> The original opinion covers only six and a fraction pages in the present record (R. 22-28). The rehearing opinion, exclusive of the dissent, required eleven pages (R. 30-41).

ried upon the Unions' banner" was not for the "enlightenment" of Vogt's employees because their membership had been previously solicited (R. 36). The court below then assumed that the public road upon which the picketing was conducted was "ordinarily patronized by only a small part of the public";<sup>26</sup> hence the picketing was not "intended for the guidance of the community". (R. 36). Thus the "only purpose" of the picketing:

"was to influence those who were engaged in transporting . . . materials to and from plaintiff's place of business and that it was conducted in the hope that these persons would refuse to continue to serve plaintiff and thereby compel it to choose between two alternatives—permit the continuance of the picketing and suffer the consequent loss of profits and **possibly of its business**,<sup>27</sup> or by some means or other to coerce or intimidate plaintiff's employees to join one of the Unions, and thereby violate the provisions of Sec. 111.06 (2) (b) Stats."<sup>28</sup> (R. 36). (Emphasis ours.)

Following the analysis of the court below, we turn first to the solicitations which preceded the peaceful picketing.

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<sup>26</sup> The record is devoid of any evidence regarding the movement of traffic on the public road in question.

<sup>27</sup> The Trial Court, adopting the allegations of the complaint (R. 5), found that "the drivers of several trucking companies have refused to deliver . . . goods . . . to and from plaintiff's premises . . . resulting in great inefficiency, inconvenience, extra labor and expense . . ." (R. 16). Compare: *Schneider v. Irvington*, 308 U. S. 147, 162.

<sup>28</sup> Section 111.06 (2) (b) makes it an unfair labor practice:

"To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative."

**A. Solicitation of Union Membership, Whether Considered Alone or in Conjunction With Subsequent Peaceful Picketing, Will Not Support a Finding of Unlawful Purpose.**

The decision of this Court in **Thomas v. Collins**, 323 U. S. 516, and the many decisions involving the solicitations by colporteurs establish beyond question that the solicitations engaged in by representatives of the Unions in the instant case were themselves an exercise of constitutionally-guaranteed rights. In the **Collins** case an order restraining the Petitioner from speaking at a union organizational meeting had been issued. The Petitioner made both a general solicitation of the audience as well as a specific solicitation of a named individual at the meeting. In striking down the subsequent contempt conviction, this Court stated (323 U. S. at 532, 537-38):

"The right thus to discuss and inform people concerning the advantages and disadvantages of unions and joining them is protected not only as a part of free speech but as part of free assembly."

... \* \* \* \* \*

"... decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. . . . The Constitution protects no less the employees' converse right."

The court below excluded the non-union employees of **Vogt** from the possible audience sought to be reached by the picketing. It did this by assuming that since the Unions had already solicited their membership, the picket line could not be intended to persuade them to action. Implicit in this assumption is the utterly untenable position that, having exercised the constitutional right to solicit membership, the Unions were thereafter precluded from using any other method of communication guaranteed

under the First Amendment in order to persuade non-union employees of the advantages of union membership.

Carried to its logical extreme, the court below would necessarily reason that direct solicitation of non-union employees could be restrained if the Unions had previously distributed pamphlets to those employees, and that pamphleteering could be restrained if the Unions had previously published a newspaper ad. This Court has never suggested that the First Amendment contains an "election of remedies" clause.

The court below would couple the fact of solicitation with the fact of picketing and, by setting up a restricted number of possible goals, reach the conclusion that the picketing was not for the "enlightenment" of Vogt's non-union employees. Thus the court would couple the exercise of two constitutionally-guaranteed rights, that is, peaceful picketing and solicitation of employees, and conclude that the Unions had an unlawful purpose.<sup>29</sup> This is precisely the type of reasoning condemned in **Thomas v. Collins**:

"Here, speech admittedly otherwise beyond the reach of the states is attempted to be brought within its licensing system by associating it with 'solicitation.' " 323 U. S. at 547. (Jackson, J., concurring.)

In another context, this Court has similarly condemned "the practice of imputing a sinister meaning to the exer-

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<sup>29</sup> If any inference can be drawn from the fact of solicitation the only inference which bears any logical relationship to the fact proved is that the Unions desired the employees of Vogt to affiliate with them. And it is a matter of hornbook law that there must be "an immediate connection" between the inferred fact and the proven fact. *Manning v. Mutual Life Ins. Co.*, 100 U. S. 693, 697-98. See also: *Tot v. United States*, 319 U. S. 463, 467-68; *Looney v. Metropolitan R. Co.*, 200 U. S. 480, 488. "In any event, rules of evidence as to inferences from facts are to aid reason, not to override it." *Maggio v. Zeitz*, 333 U. S. 56, 66.

cise of a person's constitutional rights." **Slochower v. Board of Ed. of N. Y.**, 100 L. Ed. (Adv.) 449, 454. To paraphrase, the constitutional right to engage in peaceful picketing and the equally protected right to solicit the membership of non-union employees "would be reduced to a hollow mockery if [their] exercise could be taken as equivalent . . . to a confession of" an unlawful purpose. *Id.*, at 454. The **Slochower** case came before the court in the context of the Fifth Amendment. Nevertheless, the reasoning of that case is, we believe, highly persuasive in the case at bar. For if state courts are allowed to couple the exercise of two constitutionally guaranteed rights and then spin an all-enveloping web of inferences from the exercise of these two rights, they have indeed made a "hollow mockery" of the exercise of rights guaranteed by the First and Fourteenth Amendments.

**B. The Situs of the Picketing Does Not Support a Finding of Unlawful Purpose.**

The peaceful picketing in this case occurred on "Town Road P" in the Town of Oconomowoc, Waukesha County, Wisconsin (R. 4, 12, 16). The road is a public road (R. 3, 12, 16). A private driveway leading from this public road connects Vogt's gravel pit to the Town Road (R. 3, 12, 16). There was no interference at any time with persons desiring to enter or leave the gravel pit (R. 25).

The court below went to great lengths to demonstrate in its second opinion that the situs of the picketing afforded considerable support for its conclusion that the picketing was for an unlawful purpose. The principal strand in its inferential web is that since the picketing occurred on a "lightly traveled" road, the picketing could not be intended for the "guidance of the community" (R. 36). Thus, the Wisconsin court seeks to impose a "traffic count" test by which the right to free speech is to be measured.

Assuming that the court below was correct in concluding that the number of people who would have occasion to see the picket sign would not be great, the conclusion drawn from this fact must, nevertheless, be rejected. It would be an extremely unusual constitutional doctrine which would deny to a speaker his constitutional freedom of speech because of the limited size of his audience. Typically, the speaker-representative of a minority group reaches only a few persons. It is for this reason that particular care has been taken in cases involving representatives of minority groups; it is they who most need the protection of the Constitution. **Cf. Martin v. Struthers**, 319 U. S. 141, 146; **Thornhill v. Alabama**, 310 U. S. 88, 104.

Just as no "suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the" importance of the idea expressed (**Bridges v. California**, 314 U. S. 252, 269), similarly there can be no such suggestion with respect to the size of one's audience. Insofar as the size of one's audience has been relevant to the question of whether or not his speech is constitutionally protected, the decisions of this Court make it quite clear that it is only when the size of the audience is artificially increased that restraint may be appropriate. Compare: **Kovacs v. Cooper**, 336 U. S. 77, with **Saia v. New York**, 334 U. S. 558. **Cf. Grosjean v. American Press Co.**, 297 U. S. 233.

Finally, it cannot be validly argued that the Unions by picketing on the public road bordering the situs of the dispute chose an inappropriate forum.<sup>30</sup> For as this Court stated in **Thornhill v. Alabama**, 310 U. S. 88, 105-06:

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<sup>30</sup> The fact that the picketing in the case at bar occurred at the situs of the dispute, i. e., the Town Road bordering the place of employment of the non-union employees, eliminates from this case any question of "secondary" activity. The refusal of some truck drivers to cross the picket line does not alter the primary nature of

“ ‘[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.’ **Schneider v. State**, 308 U. S. 147, 161, 163.”

**Accord: Jamison v. Texas**, 318 U. S. 413, 416.

We urge that this Court unequivocally reject any suggestion that peaceful picketing loses its status as free speech simply because its possible auditors or viewers may be few in number.

**C. The Language of the Picket Sign Does Not Support a Finding of Unlawful Purpose.**

In discussing the purpose of the Unions, the court below referred to the language of the picket sign (R. 36). It failed to consider that, in addition to the particular language used on the signs, a workingman carrying a picket sign is the traditional symbol of the existence of a labor dispute. The sign which he carries seeks to inform interested persons of the nature of the dispute.

Recognition of the fact that a workingman carrying a picket sign symbolizes the existence of a labor dispute in no way detracts from the Unions' claim to constitutional immunity. A symbol of this type is entitled to the same constitutional protection accorded any other form of communication. **Stromberg v. California**, 283 U. S. 359. See also: **West Virginia State Bd. v. Barnette**, 319 U. S. 624, 632.

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the dispute. *N. L. R. B. v. International Rice Milling Co.*, 341 U. S. 665. See also: *Pure Oil Company*, 84 N. L. R. B. 315. Compare: *Admin. Dec. of the General Counsel* (N. L. R. B.), Case No. 1008, 34 LRRM 1512; Case No. 840, 33 LRRM 1037; Case No. 739, 32 LRRM 1464.

The signs in this case clearly informed those caring to read them that the non-union status of the employees of Vogt was the cause of the dispute; for the sign read:

“The men on this job are not 100% affiliated with the A. F. L.” (R. 4, 12, 16).

Surely nothing in such language denotes a sinister purpose.

The truthfulness of the picket sign is undisputed (R. 25). Although the Unions might have chosen language which more clearly evidenced the fact that their picketing was in furtherance of their solicitation and to gain public support, neither vagueness nor extravagance of language is a basis for restraint. Compare: **Cafeteria Union v. Angelos**, 320 U. S. 293, 295; **Nann v. Raimist**, 255 N. Y. 307, 174 N. E. 165. In any event, it is clear that the decision of the Wisconsin court was not based on any inference drawn from the language of the picket sign.

#### **D. Potential or Actual Economic Loss to the Employer Does Not Support a Finding of Unlawful Purpose.**

The court below acknowledged that financial loss alone would not justify the issuance of an injunction in a labor dispute (R. 40). However, it is apparent that the court's conclusion of “unlawful purpose” was bottomed in great measure on its concern that such loss might induce the employer to violate the law (R. 36). Accordingly, in a classic example of *a priori* reasoning, it attributed to the Unions the purpose of inducing such unlawful actions by the employer (R. 37). As Professor Chaffee puts it:

“The *reductio ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow-settlers at ‘Fruitlands,’ not because he was a communist, but because he persisted in wearing such a long beard that people kept mobbing him, until

law and order were maintained by shutting him up. A man does not become a criminal because some one else assaults him, unless his own conduct is in itself illegal or may be reasonably considered a direct provocation to violence." **Free Speech in the United States**, Zechariah Chaffee, Jr., pp. 151-52 (1941).

**Cf. *Feiner v. New York***, 340 U. S. 315, 326-27 (Black J., dissenting).

Economic loss to the employer of the non-union employees does not aid those who would contend that peaceful picketing is not entitled to the First Amendment's protection. First of all, when considering whether those who have the burden of proving that peaceful picketing is not entitled to constitutional protection have met their burden, the fact of economic loss or injury is relevant only to the right to invoke the jurisdiction of the courts. Proof of economic loss in no way demonstrates the illegality of the conduct any more than it operates to rebut the constitutionality of a statute. See, e. g., ***Bordens Farm Products Co. v. Baldwin***, 293 U. S. 194; ***Rast v. Van Deem & Louis***, 240 U. S. 342; ***Lindsey v. National Carbonic Gas Co.***, 220 U. S. 61.

In numerous cases coming before this Court which have involved the exercise of First Amendment guarantees, it has been recognized that the goal of speech is to persuade others to action. ***Thomas v. Collins***, 323 U. S. 516, 537; ***Lovell v. Griffin***, 303 U. S. 444, 452; ***Ex Parte Jackson***, 96 U. S. 727, 733. **Cf. *Hague v. Committee for Industrial Organization***, 307 U. S. 496, 512. The classic statement of this proposition is found in ***Thornhill v. Alabama***, 310 U. S. 88, 104, where this Court, striking down a statute broadly proscribing the right to peacefully picket, stated:

~~"It~~ may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advanta-

geous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interest of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interest."

Indeed, throughout the history of the free speech cases in this Court, the effectiveness of a given method of communication has been a ground for commending it rather than condemning it. **Martin v. Struthers**, 319 U. S. 141, 145; **Schneider v. Irvington**, 308 U. S. 147, 164; **Superior Films v. Department of Education**, 346 U. S. 587, 589 (Douglas, J., concurring).

It is a matter of common knowledge that, by the establishment of a picket line, a union seeks to enlist the support of those sympathizing with its cause. In the case at bar, the record indicates that some truck drivers chose to honor the picketline (R. 16). The refusal of these truck drivers to cross a picketline maintained in part by a truck drivers union constitutes the grand total of economic pressure resulting from the picketing. A "right to a 'remedy' against the lawful conduct of another" does not arise merely because of incidental economic loss.<sup>31</sup> **Senn v. Tile Layers Union**, 301 U. S. 468, 483. **Thornhill v. Alabama**, 310 U. S. 88, 104.

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<sup>31</sup> Furthermore, the court below ignored the fact that in our industrial society economic loss incidental to competition between non-union and organized employees is a two-way street. Compare: *Thornhill v. Alabama*, 310 U. S. 88, 103; *American Steel Foundries v. Tri-City Council*, 257 U. S. 184, 209-210; *Duplex Printing Co. v. Deering*, 254 U. S. 433, 482 (Brandeis, J., joined by Justices Holmes and Clark dissenting); *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 157 N. E. 30.

**E. There Is No Claim or Proof That Any Unlawful Demands Were Made of Vogt.**

The complaint (R. 3-7) which initiated this action in the courts below contains not a single allegation of unlawful act or demand. Affidavits (R. 8-11) accompanying the complaint merely aver that the Unions solicited the membership of Vogt's employees. Finally, no facts were found by the courts below which even suggest that a demand of any kind was made of Vogt. **Compare: Plumbers Union v. Graham**, 345 U. S. 192, 198-99; **Building Service Union v. Gazzam**, 339 U. S. 532, 533-35; **Teamsters Union v. Hanke**, 339 U. S. 470, 472-74; **Hughes v. Superior Court**, 339 U. S. 460, 461; **Giboney v. Empire Storage Co.**, 336 U. S. 490, 492. Only by compounding possibilities and ignoring the record before it did the court below conclude that the picketing was for an unlawful purpose.

Whether the record in this case is considered in its entirety or in its various parts, we submit that Vogt did not begin to meet its "heavy burden" of demonstrating that the picketing was carried on for an unlawful purpose.

**V. The "Unlawful Purpose" Doctrine Was Used by the Wisconsin Court to Accomplish the Same Result Which the Swing and Wohl Cases Prohibit.**

In this case, the Wisconsin Court has undertaken, in substance and effect, to restrain peaceful picketing merely because no employer-employee dispute existed.<sup>32</sup> This was accomplished by concluding, as a matter of law that such picketing is for the purpose of coercing an employer into

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<sup>32</sup> Other state courts have done substantially the same. See, e. g.: *Chucales v. Royalty*, 164 Ohio St. 254, 129 N. E. 2d 823; *Bellerive Country Club v. McVey* (Mo.), 284 S. W. 2d 492; *Spokane Building and Construction Trades Council v. Audubon Homes*, 149 Wash. Dec. 144, 298 P. 2d 1112, cert. filed Dec. 10, 1956.

interfering with his employees' right of self-organization.<sup>33</sup> Thus, the court below stated:

"**Pappas v. Stacey** [151 Me. 36, 116 A. 2d 497, appeal dismissed 350 U. S. 870] was a case strikingly similar in facts. There was peaceful picketing conducted for the purpose of seeking to organize non-union employees. There was no dispute between the employer and his employees. The plaintiff had suffered and would continue to suffer in his business as a result of the picketing. The court held that the picketing was conducted for an unlawful purpose, in violation of a statute which contains provisions quite similar to those with which we are concerned. . . ." (R. 38).

\* \* \* \* \*

"The parties had stipulated that the picketing was conducted for the sole purpose of seeking to organize employees of the plaintiff but the court supplied the finding, as we do here, that the purpose of the picketing was to coerce the employer to bring pressure upon the employees to join the Union. . . ." (R. 38-39).

Surely the above does not constitute a finding of unlawful purpose;<sup>34</sup> rather, in view of the court's insistence that

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<sup>33</sup> In recent years distinctions have been drawn in the literature of industrial jurisprudence, and by some state courts, between "organizational" and "recognition" picketing. Picketing directed only at the employees has been called organizational picketing and therefore for a lawful purpose. Picketing directed at the employer in pursuance of a demand made for recognition of the union as the collective bargaining agent has been called recognition picketing. When the union does not represent a majority of the employees, recognition picketing is held to be for an unlawful purpose. Although these terms provide a convenient, short-hand method of classifying the results of decided cases, they do not necessarily provide a test comporting with decision in this Court. For the publication of the facts of a labor dispute through peaceful picketing at the site of the dispute can be restrained only when an unlawful purpose has been established. And, as we have demonstrated, no unlawful purpose has been established in this case.

<sup>34</sup> Section 8 (b) (2) of the LMRA and Section 111.06 (2) (b) of the Wisconsin Statutes make it an unfair labor practice for a union to coerce an employer into interfering with his employees' right of

it may supply a finding of unlawful purpose as a matter of law even if the parties have stipulated otherwise, it must be considered a declaration that peaceful picketing, in the absence of an employer-employee dispute, is not entitled to constitutional protection.<sup>35</sup> This Court held pre-

self-organization. The General Counsel of the N. L. R. B. has consistently refused to issue a complaint against peaceful picketing in substantially similar cases to that at bar. See: *Admin. Dec. of the General Counsel* in Case No. 1008, 34 LRRM 1512; Case No. 840, 33 LRRM 1037; Case No. 739, 32 LRRM 1464. See also: Case No. 1133, 35 LRRM 1533. Several state courts have refused to find such picketing to be for an unlawful purpose. See, e. g., *Painters Union v. Rountree Corp.*, 194 Va. 148, 72 S. E. 2d 402; *Wood v. O'Grady*, 307 N. Y. 532, 122 N. E. 2d 386; *Ira Watson v. Wilson*, 187 Tenn. 402, 215 S. W. 2d 801; *Whithead v. Miami Laundry Co.*, 160 Fla. 667, 36 So. 2d 382; *Self v. Wisner* (Ark.), 287 S. W. 2d 890; *International Union of Operating Engineers v. Utah Labor Relations Board*, 115 Utah 183, 203 P. 2d 404. See also: *Edwards v. Virginia*, 191 Va. 272, 60 S. W. 2d 916.

<sup>35</sup> *City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N. W. 2d 416, nominally held Sec. 103.535, Wis. Stat. (1953), reproduced in note 1, *supra*, unconstitutional. But in so doing the Wisconsin Supreme Court principally relied upon the original opinion in the case at bar which was subsequently withdrawn (R. 30).

The court below in its rehearing opinion apparently concluded that *A. F. L. v. Swing*, 312 U. S. 321, is no longer the law of the land, for it stated:

"It would appear from this entry [dismissal of the appeal in the *Pappas* case] that the Court dismissed the appeal because no federal question was presented, suggesting that the Court did not consider itself bound by the rule of the *Swing* case which, when this case was first studied by us, we considered as requiring reversal" (R. 40).

This is merely another example of the extremes to which the court below is willing to go in drawing "inferences." But as Justice Currie, dissenting in the court below, pointed out:

"In the *Pappas Case*, three employees of the plaintiff employer had gone on strike in an attempt to induce the employer to recognize the union and joined in the picketing. This in itself afforded adequate proof that the picketing had the unlawful objective of seeking to cause the employer to take action to coerce his employees into joining the union, and the court so held. In addition, the court also held that even if the picketing were solely for organizational purposes it could be enjoined. Thus the decision found that the picketing could be enjoined

cisely to the contrary in **Bakery Drivers' Local v. Wohl**, 315 U. S. 769, and **A. F. of L. v. Swing**, 312 U. S. 321. In both cases the state court had restrained peaceful picketing because no "labor dispute" as defined by state law existed. Both decisions were reversed. This Court stated in the **Swing** case (312 U. S., at 326):

"The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits are defined by statute or by the judicial organ of the state."

And in the **Wohl** case it was held that (315 U. S., at 774):

"... one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive."

These decisions, then, expressly prohibit the several states from enjoining peaceful picketing merely because non-union employees have no dispute with their employer.

But, as we have stated, we are here concerned with an effort to accomplish the same result through the device of a finding that when the employees at the establishment at which the picket is placed are not members of the picketing union, the picketing, as a matter of law, can be only for the sole purpose of coercing the employer to unlawfully interfere with the right of such non-union employees to remain non-union. Thus it was the absence of presently existing representation rights in the Unions which provided the basis for the determination of the legality of the

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*on two grounds, the first of which had been upheld by prior decisions of the United States Supreme Court, and the second of which has not been" (R. 45-46). (Emphasis ours.)*

peaceful picketing. This approach, as we have pointed out, ignores completely the presence of the same simple communication aspects in such picketing as are present in picketing during the course of a dispute between an employer and his own employees.—communication of the existence and nature of the dispute.

Those courts which would designate such communication aspects of peaceful picketing as unlawful economic coercion directed to the employer of the non-union employees for the purpose of inducing his violation of law are merely seeking to keep alive the fiction, shattered by the **Swing** case, supra, that "the right of free communication" exists only in a dispute between "an employer and those directly employed by him."

Such courts ignore the very real dispute which grows out of the competition of the non-union employee with the union employee and the equally urgent need for publication of the facts of such dispute. It was Justice Brandeis, joined by Justices Holmes and Clark, dissenting in **Hitchman Coal & Coke Company v. Mitchell**, 245 U. S. 229, 271, who early answered such argument by pointing out:

"It is urged that defendants are seeking to 'coerce' plaintiff to 'unionize' its mine. But coercion, in a legal sense, is not exerted when a union merely endeavors to induce employees to join with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense."

Cf. **Gompers v. Bucks Stove Range**, 221 U. S. 418, 439.

Although Justice Brandeis wrote for the minority in the **Hitchman Coal** case, it was his view which decisional history has vindicated. For in **Building Service Union v.**

**Gazzam**, 339 U. S. 532, 539-40, this Court was careful to point out:

“The Washington statute has not been construed by the Washington courts in this case to prohibit picketing of workers by other workers. The construction of the statute which we are reviewing only prohibits coercion of workers by employers. \* \* \* There is no contention that picketing directed at employees for organizational purposes would be violative of that policy. The decree does not have that effect.”<sup>36</sup>

If in the case at bar the Unions had placed an ad in a local paper proclaiming the non-union status of Vogt's employees, we submit that under no circumstances would this Court tolerate a restraint upon the publication, either prior or subsequent. See **Plumbers Union v. Graham**, 345 U. S. 192, 202 (Douglas, J., dissenting); *Dodd, Picketing and Free Speech: A Dissent*, 56 Harv. L. Rev. 513, 515-16 (1943). And if the same truck drivers had refused to enter Vogt's gravel pit because of the advertisement in the paper the result would not be changed. The Unions in the case at bar did no more than publicize the non-union status of Vogt's employees. Whether they did this through the medium of a newspaper, a pamphlet or by peaceful picketing cannot be controlling, because each is a constitutionally protected mode of communication.

### CONCLUSION.

**Bakery Drivers Local v. Wohl**, 315 U. S. 769, and **A. F. of L. v. Swing**, 312 U. S. 321, placed before this Court records in which peaceful picketing occurred at a place where

<sup>36</sup> “The patience of the Supreme Court may not be expected to endure injunctions restraining picketing carried on for shorter hours, for collective bargaining, or for organizing establishments.” *Teller, Picketing and Free Speech*, 56 Harv. L. Rev. 180, 200 (1942). See also: *Papas v. Local Joint Executive Board*, 374 Pa. 34, 96 A. 2d 915.

no employer-employee dispute existed. In both cases the peaceful picketing was preceded by solicitation of the non-union employees. In holding the picketing in the **Wohl** case to be constitutionally protected, this Court stated (315 U. S., at 775):

“[There] are no findings and **no circumstances from which we can draw the inference** that the publication was attended or likely to be attended by violence, force or coercion or conduct otherwise unlawful or oppressive.” (Emphasis ours.)

We believe the **Swing** and **Wohl** decisions to be dispositive of the issues here presented. The findings of the court below were, in every sense of the words, “spurious,” “insubstantial,” and screened reality. **Drivers Union v. Meadowmoor**, 312 U. S. 287, 293, 299. Its decision constitutes a patent disregard of the unambiguous holdings of this Court in the **Swing** and **Wohl** cases. We therefore respectfully request that this Court reverse the judgment of the court below.

Respectfully submitted,

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1956

No. [REDACTED] 79

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL  
695, A.F.L.; INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 139, A.F.L.; and BUILDING & CON-  
STRUCTION LABORERS UNION, LOCAL 392, A.F.L.,

*Petitioners,*

v.

VOGT, INC.,

*Respondent.*

On Petition for a Writ of Certiorari to the Supreme  
Court of Wisconsin

**BRIEF FOR RESPONDENT IN OPPOSITION**

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1955

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**No. 925**

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL  
695, A.F.L.; INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 139, A.F.L.; and BUILDING & CON-  
STRUCTION LABORERS UNION, LOCAL 392, A.F.L.,

*Petitioners,*

*v.*

VOGT, INC.,

*Respondent.*

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On Petition for a Writ of Certiorari to the Supreme  
Court of Wisconsin

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**BRIEF FOR RESPONDENT IN OPPOSITION**

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**OPINIONS BELOW**

The memorandum opinion of the Circuit Court for Waukesha County, Wisconsin, is unreported and is printed in the certified record (R. 101-3). The opinions of the Supreme Court of Wisconsin are reported at 270 Wis. 315, 71 N.W. 2d 359, and at 270 Wis. 321a (contained in Wis. Advance Sheets, Vol. 272, No. 1, March 3, 1956), 74 N.W. 2d 749, and are printed in Appendix B of Petition, p. 14.

## JURISDICTION

The Supreme Court of Wisconsin, on June 28, 1955, entered a mandate reversing the judgment of the Circuit Court for Waukesha County. A timely Motion for Rehearing was filed by the Respondent herein, on July 18, 1955, and was granted on October 5, 1955. After reargument heard on January 12, 1956, the Wisconsin Supreme Court, on February 7, 1956, withdrew its original mandate and substituted a new mandate affirming the judgment of the Circuit Court. It appears that the jurisdiction of this Court is invoked by Petitioners under 28 U.S.C., Section 1257(3), since the validity of the law of Wisconsin, as interpreted and applied by the Supreme Court of Wisconsin, is drawn in question on grounds of repugnancy to the Constitution of the United States.

## QUESTION PRESENTED

Whether the injunction restraining peaceful picketing by the Petitioner unions, at a place of business (Respondent's gravel pit) located on a country road and ordinarily patronized by only a small part of the public, offends the 1st and 14th Amendments to the Constitution of the United States, and which picketing was found, under the facts, to have been undertaken for the unlawful purpose of coercing or inducing Respondent to pressure or coerce its employees to join these unions, in violation of Section 111.06(2)(b) of the Wisconsin Statutes (1953). This presents no new or substantial Federal question. *Building Service Employees v. Gazzam*, 339 U.S. 532.

## STATUTE INVOLVED

The pertinent provisions of the Wisconsin Statutes are set forth in the Appendix, *infra*, p. 14.

## STATEMENT

Respondent, Vogt, Inc., operates a gravel pit in the Town of Oconomowoc, Waukesha County, State of Wisconsin, and there engages in the business of producing and selling washed sand and gravel and ready-mixed concrete. Its place of business is located on a country road not frequented by the general public (R. 104, 116, 122).

Petitioners. (hereinafter referred to as the "Unions"), from approximately August 1953 and through Spring and Summer of 1954, unsuccessfully solicited Vogt's employees, fifteen to twenty in number (R. 107), for membership in their organizations, and these employees not only did not become members of such Unions, but indicated that they did not desire to join (R. 107, 108, 111-113, 122), and have steadfastly maintained that position (R. 122).

On July 13, 1954, the Unions commenced to picket Vogt's gravel pit, carrying signs reading as follows: "The men on this job are not 100% affiliated with the A.F.L." As a result, Vogt was deprived of the services of the several trucking companies who had been hauling goods and materials to and from its place of business, since their drivers refused to cross the picket line (R. 122). This caused Vogt to suffer substantial and irreparable damage, since its business was largely dependent upon truck transportation (R. 122, 124). No labor dispute or controversy of any kind existed between Vogt and its employees or between Vogt and the Unions (R. 122, 123).

Upon Vogt's application, the Circuit Court for Waukesha County, Wisconsin, on November 9, 1954, issued a permanent injunction restraining the picketing (which had been continuous until temporarily restrained upon commencement of that action), on the ground that such picketing was not permissible since no labor dispute, as

defined by Sections 103.535 and 103.62(3), Wis. Stats. (1953), existed.<sup>1</sup> The trial court found that the purpose of the picketing was to induce Vogt's employees to organize and affiliate with the Unions (R. 101, 122).<sup>2</sup>

On appeal, the Supreme Court of Wisconsin, in its first opinion, issued on June 28, 1955, reversed the Circuit Court, relying primarily upon *A.F.L. v. Swing*, 312 U.S. 321, as affecting the validity of Sec. 103.535, Wis. Stats. (1953),<sup>3</sup> (App. B. of Pet., pp. 14, 21). Subsequently, the Court below granted a motion for rehearing and ordered a reargument of the case.

On February 7, 1956, the Wisconsin Supreme Court withdrew its original opinion and substituted (one Justice dissenting) a new opinion and mandate affirming the judgment of the Circuit Court (R. 145; App. B of Pet., p. 41). In its second opinion the Court held that, under the facts disclosed by the record, the picketing had been engaged in for the purpose of coercing or inducing Vogt to pressure or coerce its employees to join the Unions (App. B of Pet., pp. 28, 29-30, 34). The Court below thus found that the picketing was undertaken for a purpose made unlawful by the public policy of Wisconsin, as expressed by Sections 111.04 and 111.06(2)(b), Wis. Stats. (1953) [Appendix, *infra*, p. 14], (App. B of Pet., pp. 26, 34), which policy guarantees employees the right of self-organization (including the right to refrain from joining a union), free from pressures or coercion from any source. It held, therefore, under the rule of *Build-*

<sup>1</sup> These statutory provisions are quoted in the Petition, p. 3, Note 1.

<sup>2</sup> Respondent had requested of the trial court a finding that the purpose of the picketing was to coerce or induce it, the employer, to pressure or induce its employees to join the Unions, which finding was not adopted by the trial court (App. B of Pet., pp. 17-18, 27-28).

<sup>3</sup> See Note 1, above. *Cf.*, *City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N.W. 2d 416, decided on the same day.

*ing Service Employees v. Gazzam*, 339 U.S. 532, that the injunction did not violate those provisions of the Federal Constitution which protect the right of freedom of speech (App. B of Pet., pp. 27, 34).

## ARGUMENT<sup>o</sup>

### I. The Finding which the Wisconsin Supreme Court Itself Made Was Clearly Warranted by the Evidence and the Only Possible Reasonable Inferences Which It Deduced Therefrom.

Wisconsin, by the enactment of Section 111.04, Wis. Stats. (App., *infra*, p. 14) has declared it to be its public policy that employees shall have the right of self-organization and the right to form, join or assist labor organizations, or to bargain collectively through representatives of their own choosing, and that they shall also have the *right to refrain* from any or all of such activities, free from interference, restraint or coercion from any source. In furtherance thereof, the Legislature declared it to be an unfair labor practice and a violation of that public policy to engage in any acts constituting, directly or indirectly, interference, restraint or coercion of employees in the exercise of the rights thus guaranteed. Section 111.06(2)(a) and (b), Wis. Stats. (App., *infra*, p. 14).

The Supreme Court of Wisconsin made a finding that the picketing by the Unions, Petitioners herein, had been engaged in for an unlawful objective in that it was undertaken for the purpose of coercing or inducing the employer, Vogt, Inc., to coerce or pressure its employees to become members of these Unions. Under the facts disclosed by the record, and on the basis of the inferences reasonably and justifiably to be drawn therefrom — so penetratingly analyzed in its decision (App. B of Pet.,

pp. 27-29)—the Wisconsin Court could not but conclude that

"The inference that the picketing was conducted for an unlawful purpose is inescapable."

The Court below considered, as did this Court in *Hughes v. Superior Court*, 339 U.S. 460, 468, that there are "compulsive features inherent in picketing [which go] beyond the aspect of mere communication as an appeal to reason," and held that the undisputed material facts would admit of only one inference, i.e., that the picketing was conducted for an unlawful purpose. It recognized that the effect of the picketing was confirmatory of its purpose. Compare *Local Union No. 10 v. Graham*, 345 U.S. 192, 200.

When unions picket the place of business of an employer, and *claim* that the purpose of the picketing was to disseminate information, as here, such information could have been intended for only three possible audiences: (1) For the *employees*, although they certainly knew already that they "were not 100% affiliated with the A.F.L." (R. 106); or (2) for the *general public*, but since the general public does not frequent, to any substantial extent, a lonely country road (R. 104-5, App. B of Pet., p. 28), it could not have been the target, either. (3) That leaves only the *employer*, and it is, therefore, obvious that the picketing, here, was undertaken in order to exert coercive pressure upon Vogt, Inc.

Consider the predicament of the Respondent, Vogt, Inc., resulting from the picketing. Vogt's employees had constantly refused to be "organized" and maintained that position to the very last, as was found by the trial court (R. 122). Thereupon the Unions commenced to picket, with the result that Vogt was cut off from all truck trans-

portation (R. 122). The employer, Vogt, then had *only two alternatives*: (1) It could recognize and deal with the Union, or "induce" its employees to join the unions — in the face of the employees' refusal to become organized — and Vogt would thereby be violating the Wisconsin Stats.,<sup>4</sup> or (2) it could permit the continuance of the picketing and suffer the consequent economic losses, and probably be compelled to go out of business altogether.

Under these circumstances, the finding of the Court below has ample factual support and is clearly right.

## II. The Decision of the Court Below Does Not Warrant Certiorari, Because No New or Substantial Federal Question Is Presented.

The Wisconsin Supreme Court has quite properly found that the picketing, here, was undertaken for an unlawful purpose, since the record, as a whole, disclosed no reasonable objective for the picketing other than to accomplish the "effect" which it had. It is settled that such picketing is *not* immune from State restraint as Con-

<sup>4</sup> The applicable Wisconsin statutes read as follows:

"111.06 *What are unfair labor practices.* (1) It shall be an unfair labor practice for an employer individually or in concert with others:

"(a) To interfere with, restrain or coerce his employees in the exercise of the rights guaranteed in section 111.04.

"(b) To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it, \* \* \*

"(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; \* \* \*

"(e) To bargain collectively with the representatives of less than a majority of his employes in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1)(c) of this section."

stitutionally protected free speech. *Building Service Union v. Gazzam*, 339 U.S. 532; *Hughes v. Superior Court*, 339 U.S. 460; *Teamsters Union v. Hanke*, 339 U.S. 470; *Local Union No. 10 v. Graham*, 345 U.S. 192; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490.

Petitioners assert (Pet., p. 11) that the decision of the Court below was premised upon the fact of economic damage or loss to the employer. That, however, is not correct. The basis for the Wisconsin Court's decision is the statutory guarantee of free choice of employee representatives and of the employees' right to self-organization. The economic loss is merely an incidental ingredient which, together with the other facts established by the record, establishes and proves the true objective of the Unions' activities.

These statutes, enacted by Wisconsin to guarantee employees the right of self-organization, as interpreted by the State's highest tribunal, do not, of course, deprive unions of the right or opportunity to "organize" unorganized workers, i.e., peacefully to solicit employees to become members of these unions, or to seek their representation rights. By Sec. 111.05, Wis. Stats. (1953), part of the same Act containing the statutory provisions involved in the instant case, Wisconsin has created simple and workable machinery which permits labor unions to obtain representation rights through free elections and by orderly proceedings devoid of coercive influences.

It is, of course, futile and inadmissible to judge the injunction issued here solely as an order standing alone, or only in connection with some isolated factual element related to it. Rather, it must be considered in the light of *all* of the facts, circumstances and limitations which

were considered by the Court below. See *Teamsters Union v. Hanke*, *supra*, where this Court said (at p. 480) :

"When an injunction of a State court comes before us it comes not as an independent collocation of words. It is defined and confined by the opinion of the State court. The injunctions \* \* \* are to be judged here with all the limitations that are infused into their terms by the opinions of the Washington Supreme Court on the basis of which the judgments below come before us."

To the same effect, *Hotel & R.E.I. Alliance v. W.E.R.B.*, 315 U.S. 437, 441.

If, under the particular circumstances of the instant case, Wisconsin could not enjoin the picketing because it was Constitutionally protected as free speech, it would enable a union effectively to put an employer out of business whenever his employees exercised their right to refrain from joining a labor organization, a right guaranteed by Wisconsin's public policy. See *Building Service Employees v. Gazzam*, 339 U.S. 532, 540-541. Such a result would be incompatible with the well-established principles, as stated by the Court below. (App. B of Pet., p. 22), that "free speech is not the only right secured by our fundamental law, and that it must be weighed, here for instance, against the equally important right to engage in a legitimate business free from dictation by an outside group, and the right to protection against unlawful conduct which will or may result in the destruction of a business; that both the right to labor and the right to carry on business are liberty and property." See also *Teamsters Union v. Hanke*, 339 U.S. 470, 474; *Truax v. Corrigan*, 257 U.S. 312.

Petitioners rely especially upon *A.F.L. v. Swing*, 312 U.S. 321, as supporting their contention that the injunc-

tion, here, violated the free speech guarantee of the Federal Constitution. But that case is totally inapplicable under the instant facts, just as stated by this Court in *Building Service Union v. Gazzam*, 339 U.S. 532, at 539:

"Petitioners insist that the *Swing Case*, *supra*, is controlling. We think not. In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any lawful purposes is not prohibited by the decree under review. The State has not here, as in *Swing*, relied on the absence of an employer-employee relationship. Thus the State has not, as was the case there, excluded 'workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' 312 U.S. 326."

For the Wisconsin Supreme Court emphasized in its opinion (App. B of Pet., p. 34) that:

"Our decision is not to be construed as holding that the state may forbid peaceful picketing solely because there is no immediate employer-employee dispute as was held in the *Swing* case."

Picketing, conducted under facts and statutes similar to those here involved, whether labeled "organizational" or "recognition" picketing,<sup>5</sup> has been held in numerous

<sup>5</sup> It is now widely recognized that there is no difference between so-called "organizational" picketing and "recognition" picketing. *Petro*, "Recognition & Organizational Picketing," 3 *Lab. L. J.* 819 (1952); *Blue Boar Cafeteria v. Hotel & Restaurant Union*, 312 Ky. 288, 254 S.W. 2d 335, 339, *cert. den.* 346 U.S. 834; *Wilbank v. Bartenders Union*, 360 Pa. 48, 60 A. 2d 21, 22, *cert. den.* 336 U.S. 945.

jurisdictions as being, in fact, undertaken for the unlawful purpose of causing an employer to pressure his employees into joining a union, in violation of such employees' free choice of bargaining representative, and was held to be properly enjoined.

Petitioners' claim (Pet., p. 10) that the state courts "had given varied treatment" to identical fact situations is not supported by the authorities to any substantial degree. Many of the state court cases which Petitioners cite (Pet., p. 10) antedate the more recent decisions of this Court relating to picketing and "free speech" (the *Gaziam*, *Hughes*, *Hanke*, *Graham* and *Giboney* cases, cited *supra*) and, in some instances, have been superseded by later decisions of the same jurisdictions. Some of these cases involved materially different facts, and nearly all of them lacked the particular statutory provisions which are here controlling.

On the contrary, situations of the instant type, involving similar statutes, have been passed upon by numerous state courts with like result. A number of these cases were heretofore presented to this Court. *Pappas v. Stacey*, 151 Me. 36, 116 A. 2d 487, *appeal dismissed* 350 U.S. 870, "was a case strikingly similar in its facts." It was there held that peaceful picketing for organizational purposes was engaged in for an objective made unlawful by a Maine statute similar to Wisconsin's and could be enjoined. That case is discussed at length in the opinion of the Court below (App. B of Pet., pp. 31-34). In *Postma v. Teamsters Union*, 324 Mich. 347, 54 N.W. 2d 681, 684, *cert. den.*, 345 U.S. 922, a case arising under almost identical facts, and in *Blue Boar Cafeteria v. Hotel & Restaurant Union*, 312 Ky. 288, 254 S.W. 2d 335, 339, *cert. den.*, 346 U.S. 834, it was noted that, as here, the only way by which the employer could have escaped the picketing was

by recognizing the union or by coercing the employees to join and that, therefore, the unlawful purpose was established. The court found, in *Miami Typographical Union v. Ormerod*; (Fla. 1952), 61 So. 2d 753, that, as here, the picketing could not have been aimed at the general public, in view of its locale, and held it to have been directed at the employer in order to induce him to coerce his employees in their right to self-organization.

Compare also *Baderak v. Bldg. Trades Council*, 380 Pa. 477, 112 A. 2d 170, 173; *Sansom House v. Waiters Union*, 382 Pa. 476, 115 A. 2d 746, 750, cert. den. 350 U.S. 896; *Tallman Co. v. Latal*, Mo. S. Ct. (Div. No. 2), No. 43437, March 8, 1954, 33 LRRM 2725, 2729, 25 CCH Labor Cases, Par. 68,207; *Boca Raton Club v. Hotel Union*, — Fla. —, 83 So. 2d 11, 16; and *Self v. Wisener*, — Ark. —, 287 S.W. 2d 890, 892, where it was held that because the union had *not* solicited the employees for membership (unlike here), the record would not sustain a finding that the purpose of the picketing was to coerce the employer to force these employees to join the union. This is in harmony with the reasoning of the Court below that the fact, among others, of repeated unsuccessful solicitations did compel such a finding.

The Wisconsin Supreme Court, in deciding as it did, has followed respectable authority. No basic conflicts are apparent among those of the cases which were decided after this Court handed down its 1950 decisions in the *Hughes*, *Hanke* and *Gazgam* cases, *supra*. If the order of the Court below is viewed in the light of the particular facts which gave rise to it and under the limitations imposed by that Court's opinion, it becomes readily apparent that there is not presented here a new or substantial federal question, nor one having wide and general application.

## CONCLUSION

The decision of the Wisconsin Supreme Court is plainly correct under the principles enunciated by this Court in *Building Service Employees v. Gazzam*, and no new or substantial federal question is presented. The petition for a writ of certiorari should therefore be denied.

*Respectfully submitted,*

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## APPENDIX

The relevant provisions of Chapter 111 of the Wisconsin Statutes (1953) are as follows:

### 111.06 What Are Unfair Labor Practices.

\* \* \* \*

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To ~~coerce~~ or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employer or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

\* \* \* \*

111.04 **Rights of Employes.** Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities.

\* \* \* \*

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

**October Term, 1956**

**No. 79**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL  
695, A.F.L.; INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 139, A.F.L.; and BUILDING & CON-  
STRUCTION LABORERS UNION, LOCAL 392, A.F.L.,**  
*Petitioners,*

**v.**

**VOGT, INC.,**

*Respondent.*

**On Writ of Certiorari to the  
Supreme Court of Wisconsin**

**BRIEF FOR RESPONDENT**

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October Term, 1956

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**No. 79**

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL  
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*Petitioners,*

v.

VOGT, INC.,

*Respondent.*

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On Writ of Certiorari to the  
Supreme Court of Wisconsin

---

**BRIEF FOR RESPONDENT**

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**OPINIONS BELOW**

The memorandum opinion of the Circuit Court for Waukesha County, Wisconsin, (R. 1-2) is unreported. The opinions of the Supreme Court of Wisconsin (R. 22-28 and R. 30-46) are reported at 270 Wis. 315, 71 N.W. 2d 359, and at 270 Wis. 321a, 74 N.W. 2d 749.

## JURISDICTION

The Supreme Court of Wisconsin, on June 28, 1955, entered a mandate reversing the judgment of the Circuit Court for Waukesha County (R. 28). A timely motion for rehearing was filed by the Respondent herein, on July 18, 1955 (R. 28) and was granted on October 5, 1955 (R. 29). After reargument heard on January 12, 1956 (R. 29), the Wisconsin Supreme Court, on February 7, 1956, withdrew its original mandate and substituted a new mandate affirming the judgment of the Circuit Court (R. 41). A petition for certiorari was filed on May 4, 1956, and was granted on October 8, 1956 (R. 47). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

## QUESTION PRESENTED

Whether peaceful picketing at a place of business (Respondent's gravel pit) located on a country road is protected by the First and Fourteenth Amendments to the Constitution of the United States, where such picketing was found to have been undertaken for the unlawful purpose of coercing or inducing the employer to pressure or coerce its employees to join the picketing unions, in violation of Section 111.06(2)(b) of the Wisconsin Statutes (1953).

## STATUTES INVOLVED

The pertinent provisions of Chapter 111 of the Wisconsin Statutes (1953), including Section 111.06(2)(b), are printed in the Appendix, *infra*, p. 57ff.

## STATEMENT

Respondent, Vogt, Inc., operates a gravel pit in the Town of Oconomowoc, Waukesha County, State of Wisconsin, and there engages in the business of producing and selling washed sand and gravel and ready-mixed concrete. Its place of business is located on a country road not frequented by the general public (R. 3, 16).

Petitioners (hereinafter referred to as the "Unions"), from approximately August 1953 and through Spring and Summer of 1954, unsuccessfully solicited Vogt's employees, fifteen to twenty in number (R. 5), for membership in their organizations, and these employees not only did not become members of such Unions, but indicated that they did not desire to join (R. 5, 8-11, 16), and have steadfastly maintained that position (R. 16).

On July 13, 1954, the Unions commenced to picket Vogt's gravel pit, carrying signs reading as follows: "The men on this job are not 100% affiliated with the A.F.L." As a result, Vogt was deprived of the services of the several trucking companies who had been hauling goods and materials to and from its place of business, since their drivers refused to cross the picket line (R. 16). This caused Vogt to suffer substantial and irreparable damage, since its business was largely dependent upon truck transportation (R. 16, 17). No labor dispute or controversy of any kind existed between Vogt and its employees or between Vogt and the Unions (R. 16, 17). The parties stipulated that the present record contains all of the facts which *would* be adduced upon a trial on the merits (R. 20).

Vogt filed a complaint in the Circuit Court for Waukesha County, Wisconsin, alleging that the picketing was conducted for the purpose of coercing it to compel its

employees to join the unions, in violation of Sec. 111.06 (2) (b), Wis. Stats. (1953) (R. 5-6) and, further, that the picketing was in violation of Sec. 103.535, Wis. Stats., (1953); since no labor dispute as defined in Sec. 103.62 (3), Wis. Stats. (1953) existed (R. 6),<sup>1</sup> and prayed for injunctive relief. The trial court, on November 9, 1954, issued a permanent injunction (R. 18-19) restraining the picketing (which had been continuous until temporarily restrained upon commencement of the action), on the ground that such picketing was not permissible, since no labor dispute, as defined in Secs. 103.535 and 103.62(3) existed. That court found that the purpose of the picketing was to induce Vogt's employees to organize and affiliate with the Unions (R. 16), and did not adopt the finding, requested by Vogt, that the purpose of the picketing was to coerce or induce the employer to pressure or induce its employees to join the Unions (R. 25, 35).

On appeal, the Supreme Court of Wisconsin, in its first opinion, issued on June 28, 1955, reversed the Circuit Court, relying primarily upon *A.F.L. v. Swing*, 312 U.S. 321, as affecting the validity of Sec. 103.535; Wis. Stats. (1953),<sup>2</sup> (R. 21, 22-28). Subsequently, the Court below granted a motion for rehearing and ordered a reargument of the case (R. 29).

On February 7, 1956, the Wisconsin Supreme Court withdrew its original opinion and substituted (one Justice dissenting) a new opinion and mandate affirming the judgment of the Circuit Court (R. 29-30, 41). In its

<sup>1</sup>These statutory provisions are quoted *infra*, p. 36, Note 40.

<sup>2</sup>See Note 1, above. Cf., *City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N.W. 2d 416, decided on the same day, discussed *infra*, p. 37, Note 42.

second opinion the Court found<sup>3</sup> that, under the facts disclosed by the record, the picketing had been engaged in for the purpose of coercing or inducing Vogt to pressure or coerce its employees to join the Unions (R. 35, 37, 41), a purpose made unlawful by Sections 111.04 and 111.06 (2) (b), Wis. Stats. (1953) [Appendix, *infra*, p. 58, 59], (R. 26, 41), which guarantee employees the right of self-organization (including the right to refrain from joining a union), free from pressures or coercion from any source. It held, therefore, under this Court's decision in *Building Service Employees v. Gazzam*, 339 U.S. 532, that the injunction did not violate the free speech provisions of the Federal Constitution (R. 34-35, 41). The Court below also stated its decision was not to be construed as approving restraint of peaceful picketing "solely because there is no immediate employer-employee dispute as was held in the *Swing* case." (R. 41).

---

<sup>3</sup>Petitioners, in their statement (Pet. Br. 5-6), present an incomplete and, in form, somewhat sarcastic explanation of the reasoning of the Wisconsin Court in arriving at the decision and judgment which is here under review. That reasoning, the basis for its judgment, is stated clearly and succinctly in the second opinion of the Wisconsin Court. (R. 30-1, and R. 35-6).

## SUMMARY OF ARGUMENT

I. The public policy of Wisconsin guarantees workers the right to self-organization, the right to form, join or assist labor unions, to engage in concerted activities for mutual aid and protection and, also, the *right to refrain* from any and all such activities — free of interference *from any source*. Further, the Wisconsin Act makes unlawful the coercion of employers to interfere with these rights, as well as the intimidation of employees. Nevertheless, Petitioners here engaged in picketing, solely, in order to coerce the employer to intimidate its employees into joining the unions in violation of this State policy. Picketing is the signal to union members and their sympathizers not to cross the picket line and thus inflicts coercive economic pressure on the picketed employer. *Hughes v. Superior Court*, 339 U.S. 460, 464-5; *Teamsters Union v. Hanke*, 339 U.S. 470, 474. Because of its foreseeably coercive effects, confirming its purpose, a claim that the picketing was conducted solely for peaceful persuasion of employees is unreal — “peaceful persuasion” terminated when the picketing commenced. Under all of the facts and circumstances (including the employees’ persistence in refusing to join the unions) and the natural inferences flowing therefrom, the picketing clearly was undertaken for an unlawful purpose. Anomalously, if the picketing were held not to be subject to restraint, the employer could be forced to go out of business whenever its employees elected to exercise their statutory right not to join a union or, else, would have to violate the law. *Building Service Employees v. Gazzam*, 339 U.S. 532, 540.

II. The findings of the Wisconsin Supreme Court are based upon substantial factual foundations. Because they

do not represent a disregard of constitutional mandates and are certainly not "spurious," there is no warrant to re-examine these findings. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160; *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293. This Court has always held that the reasoning and conclusions of the State supreme courts are given a "weighty title of respect." *Teamsters Union v. Hanke*, *supra*, at 475.

III. A. Notwithstanding the broad language in *Thornhill v. Alabama*, 310 U.S. 88, peaceful picketing cannot inevitably be equated with constitutionally protected free speech; it is more than that and is, in fact, coercion. But peaceful picketing involving "coercion or conduct otherwise unlawful or oppressive," i.e., undertaken for an unlawful object, may be restrained, *Teamsters Union v. Hanke*, 339 U.S. 470, 474; *Building Service Employees Union v. Gazzam*, 339 U.S. 532, 536-7, and it was such a purpose, violative of Wisconsin law, and not the absence of an employer-employee dispute, which removed the picketing here from Constitutional protection. Not *A.F.L. v. Swing*, 312 U.S. 321 and *Baker Drivers Local v. Wohl*, 315 U.S. 769, but *Building Service Employees v. Gazzam*, *supra*, is controlling. Moreover, the right to engage in a lawful business, free from outside interference, is also guaranteed by the Constitution. *Carpenters & Joiners v. Ritter's Cafe*, 315 U.S. 722, 725; *Truax v. Corrigan*, 257 U.S. 312, 327, 331-2. In exercising their rights, labor unions must give due regard to the equally important rights of others.

B. Contemporary conditions and circumstances relating to industrial disputes must be taken into account in deciding the issues here in question. *Teamsters Union v. Hanke*, 339 U.S. 470, 479-80. Labor unions no longer

are weak, helpless and impotent, but have grown into a powerful national economic force which fact has gained national public recognition. In addition, Wisconsin, as part of its social and economic policy, has enacted a comprehensive labor code, substituting judicial and administrative processes for militant methods of industrial warfare, — the ballot box was to replace coercive picketing and boycott for legitimate organizing efforts.

C. In view of these changed circumstances, this Court must reexamine the "constitutional boundary line between competing interests" in industrial society. Cf., *Hughes v. Superior Court*, 339 U.S. 460, 466. A review of the constitutional issues herein necessarily involves a consideration of the legitimate rights, not only of labor unions, but also of employers, employees and of the public. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 496. A "little" employer, like Respondent, is also entitled to, and requires, the protection of the law against the illegal destructive economic harm engendered by industrial warfare. The Wisconsin statute affords such protection to all and guarantees workers full freedom of self-organization and association without interference. Such a statute, as construed by the Court below, does not offend the Constitution.

## ARGUMENT

### I.

THE FINDING OF THE WISCONSIN SUPREME COURT THAT THE PICKETING WAS UNDERTAKEN FOR AN UNLAWFUL PURPOSE IS MANIFESTLY CORRECT AND THE ONLY ONE POSSIBLE UNDER THE EVIDENCE AND THE NATURAL INFERENCES DEDUCIBLE THEREFROM

A. The Public Policy of Wisconsin Guarantees Workingmen Full Freedom of Association and of Self-organization, Including the Right to Refrain from Joining a Labor Organization.

In furtherance of its social and economic policies,<sup>4</sup> and for the purpose of promoting industrial peace in the interests of the public, employees and employers alike, Wisconsin has enacted a comprehensive labor relations act, Ch. 111, Wis. Stats. (1953),<sup>5</sup> the Employment Peace Act (hereinafter referred to as the "Act"). The pertinent provisions of such Act are set forth in the Appendix, *infra*, p. 57ff. By Sections 111.01 (3) and 111.04, the Act establishes the cardinal principle<sup>6</sup> that employees shall be free to associate with or join labor organizations and, in addition, that they shall also be free to *refrain* from such associations.<sup>7</sup> In order to safeguard these rights of self-organization granted to workingmen, the Act

<sup>4</sup>Cf., *Teamsters Union v. Hanke*, 339 U.S. 470, 474-5.

<sup>5</sup>Created by Ch. 57, Wis. Laws, 1939.

<sup>6</sup>App., *infra*, p. 58.

<sup>7</sup>A similar policy is embodied in Section 7 of the National Labor Relations Act, as amended in 1947, 29 U.S.C.A., Sec. 157.

makes unlawful, in Sec. 111.06, certain activities and declares them to be "unfair labor practices."

# 1. The Activities Prohibited by Section 111.06(2)(b).

As related to the facts and activities involved in this case, Respondent alleged in its Complaint (R. 6), and the Wisconsin Supreme Court found (R. 35-37, 41), that Petitioners, by their picketing activities, had violated Sec. 111.06(2)(b) of the Act in that such picketing had been undertaken for the purpose of intimidating Respondent to coerce its employees to join petitioner unions or to designate them as their bargaining representatives. Subsec. (2)(b) of Sec. 111.06, Wis. Stats., reads as follows:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

\* \* \*

"(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative."

This subsection thus makes it unlawful for an employee, or a labor organization

(1) to coerce, intimidate or induce an employer to interfere with the rights of his employees, including those guaranteed by Sec. 111.04,

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\*Relief against the commission of such unfair labor practices may be had before the Wisconsin Employment Relations Board as well as by the pursuit of legal or equitable relief in the courts. Sec. 111.07(1), Wis. Stats. (1953) (App., *infra*, p. 59).

or

(2) to coerce, intimidate or induce an employer to engage in any practice in regard to his employees which would constitute an unfair labor practice if engaged in by the employer on his own initiative.

The first of these prohibitions involves the legal rights of the employees, including those guaranteed in Sec. 111.04. That section grants employees the right to self-organization, including the right to select their own bargaining representative, but also gives them "the right to refrain from any or all of such activities."

The second of these prohibitions forbids a labor organization to coerce, intimidate or induce an employer to commit any of the acts banned by subsection (1) of Sec. 111.06 (App. *infra*, p. 58). Among the thus proscribed activities, relevant to the facts in this case, are the following:

Interference with the rights of the employees [§ 111.06(1)(a)],

Encouraging or discouraging membership in any labor organization [§ 111.06(1)(c)], and

Bargaining collectively with representatives of less than a majority of one's employees [§ 111.06(1)(e)].

Stated another way, the question really is whether the facts disclosed by the record, and the permissible inferences, can support the finding that Petitioner's acts tended to coerce, intimidate or induce Respondent not only to interfere with its employees' rights, protected by Sec. 111.04, but also to engage in any of the practices forbidden to the employer by subsection (1) of Sec. 111.06.

B. The Facts and Natural Inferences, in their Totality, Demonstrate a Clear Violation of Sec. 111.06(2)(b).

1. The Picketing was not Engaged in Merely for the Dissemination of Information, or for Persuasion, but for the Purpose of Coercing the Employer.

Only recently Mr. Justice DOUGLAS had occasion to point out<sup>9</sup> that

"Picketing is more than speech; it is physical conduct on streets or at factory doors. Like a procession or a parade, it presents special problems which speech, and speech alone, does not involve."<sup>10</sup>

Indeed, the very term "picket" denotes a militant purpose which is inconsistent with peaceful persuasion, *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 205, 207, and it necessarily embraces elements of intimidation. Although it is sometimes contended that *Thornhill v. Alabama*, 310 U.S. 88, in 1940, put picketing on a par with speech and placed all such activity under the protection of the First and Fourteenth Amendments, subsequent decisions of this Court have dispelled any such notions and have made it abundantly clear that picketing is more than speech and that, though it may have ingredients of communication, "it cannot dogmatically be equated with constitutionally protected freedom of speech." *Teamsters Union v. Hanke*, 339 U.S. 470, 474. This is so because the picket line exerts influences and produces consequences unlike other modes of communication, such as publications in a news-

<sup>9</sup>Douglas, *We, the Judges*, p. 318 n. 4 (1956).

<sup>10</sup>Compare *Cox v. New Hampshire*, 312 U.S. 569.

paper or in circulars. See *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 776-7 (concurring opinion); *Hughes v. Superior Court*, 339 U.S. 460, 464-5; *Building Service Employees v. Gazzam*, 339 U.S. 532, 537; *Thomas v. Collins*, 323 U.S. 516, 543-4 (concurring opinion).<sup>11</sup>

Whenever a union resorts to picketing, it nearly always represents a deliberate decision by it to inflict economic harm on the employer picketed. Picketing, whatever its motive in a particular case, "is generally a labor activity carried on in furtherance of a plan to impede the picketed person's opportunity to enjoy a free and open market."<sup>12</sup> Cf., *Capital Service, Inc. v. N.I.R.B.* (C.A. 9), 204 F. 2d 848; 852-3, and Note d.

Respondent alleged in its Complaint (R. 6) that Petitioners, by their conduct, had violated Sec. 111.06(2)(b), Wis. Stats. (1953), in that the picketing had been engaged in for the purpose of coercing, intimidating and inducing the employer to force, compel or induce its employees to become members of the unions (R. 5-6).

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<sup>11</sup>Many legal writers have come to the conclusion, after extensive analysis of the various aspects involved, that picketing cannot at all be equated with free speech, but amounts to coercion of the target picketed. Gregory, "Picketing and Coercion: a Defense," 39 *La. L. Rev.* 1053 (1953); Teller, "Picketing and Free Speech," 56 *Harv. L. Rev.* 189, 201 (1942).

Others have criticized the view, then thought to be expressed in the *Thornhill* case and in *Carlson v. California*, 310 U.S. 106, that picketing, with few exceptions, was to be equated with constitutionally protected free speech. Teller, *supra*, at 202-3; Corwin, Book Review, 56 *Harv. L. Rev.* 484, 486 ("In many instances, picketing, even when unaccompanied by actual violence or fraud, is coercive and intended so to be; and when it is, it is related to freedom of speech to about the same extent and in the same sense as the right to tote a gun is related to the right to move from place to place."); Gregory, *Labor and the Law*, 349 (Rev. Ed., 1949).

<sup>12</sup>Teller, *supra*, Note 11, at 202; Petro, "Recognition and Organizational Picketing," 3 *Lab. L. J.* 819, 820 (1952).

Although the trial court refused to make such a finding (R. 25, 35), but held that the purpose of the picketing "was to induce the employees to organize and affiliate with defendants" (R. 1), the Wisconsin Supreme Court, in its second opinion, did so find, as initially alleged by Respondent (R. 35, 37, 41). That such finding of the Wisconsin Supreme Court is indubitably right, and the only one possible, will be easily apparent upon a closer examination of the facts.

What are these facts? The unions had made repeated efforts for a period of approximately one year to persuade and convince Respondent's employees that they should join these labor organizations, and to be authorized to represent the employees. These "organizational" efforts remained totally unsuccessful (R. 8-11, 12, 16). The trial court specifically found that the employees *did not desire* to join these labor organizations (R. 16).

Only, after the futility of such peaceful-persuasion methods had become apparent, did Petitioners commence to inflict coercive pressure upon the employer by picketing its place of business (R. 4). The immediate result was that Respondent was cut off from its sources of supply and was deprived of the services of the trucking companies, the drivers of which refused to haul goods and materials to and from Respondent, and the consequent damage to Respondent's business—largely dependent upon trucking transportation—was substantial (R. 16, 17).

The ostensible *motive* of Petitioners for engaging in this picketing is said to have been to advertise that Respondent's employees were not affiliated with the A.F.L. (Pet. Br. 27). Such motive might, perhaps, be legitimate and proper, if the actual and primary purpose of such picketing is to persuade non-union employees to join the

union.<sup>13</sup> Here, in view of the union's *past unsuccessful* acts of "persuasion," the intent of Petitioners, no doubt, was not merely to engage in acts of "peaceful persuasion." Here the *intent* was, and only could have been, to place economic pressure upon the neutral, innocent employer because the prior acts of peaceful persuasion and solicitation directed against its employees themselves had proven totally unsuccessful (R. 16). The picketing, quite naturally, was intended to constitute the *added next step*, productive of forcible economic sanctions, in the inexorable standard procedure of unions to bring unorganized workers "into line." This was *more than* peaceful persuasion: it was purposely intended and calculated to cause severe economic harm to the neutral employer through the exertion of coercive pressure, and such coercion was applied openly, directly and effectively. The situation was exactly as described by Mr. Chief Justice TAFT in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, at 204:

"We are a social people and the accosting by one of another in an inoffensive way, and an offer by one to communicate and discuss information with a view to influencing the other's action, are not regarded as aggression or a violation of that other's rights. *If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging, become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation.*" (Emphasis supplied)

<sup>13</sup>There exists serious doubt whether, in many situations, it can be said, considered realistically, that a union's picketing is directed at the employees, rather than against the employer, in view of the "signal" effect of the picketing and of its natural and commonly-known concomitants, that is, of "established union policies and traditions." *Local Union No. 10 v. Graham*, 345 U.S. at 200. See *infra*, p. 15ff.

To the same effect, *Thomas v. Collins*, 323 U.S. 516, 538-9; *Boca Raton Club v. Hotel Union*, — Fla. —, 83 So. 2d 11, 16; *Bitzer Motor Co. v. Local 604, I.B.ofT.*, 349 Ill. App. 283, 110 N.E. 2d 674, 677; *Independent Dairy Workers Union v. Milk Drivers Local 680*, 23 N.J. 85, 127 Atl. 2d 869, 875; cf., *Self v. Wisener*, — Ark. —, 287 S.W. 2d 890, 892.

It is clear that here the union had no hope of winning over the employees by peaceful persuasion, and that it, therefore, resorted to picketing coercive of employer and employees.<sup>14</sup>

## 2. The "Signal" Effect of the Picketing, Under the Circumstances Present, Discloses the Employer as the Only Possible Target.

The record discloses a cumulative chain of direct and circumstantial evidence fully supporting Respondent's contention — and the finding of the Wisconsin Supreme Court (R. 35-37) — that it was the purpose of the petitioner unions to coerce the employer.

It is, of course, common knowledge that picket lines will not be crossed by employees, or other parties, who have some direct or indirect interest in the matter. These are the "established union policies and traditions" noted in *Local Union No. 10 v. Graham*, 345 U.S. at 200, which evoke the "loyalties and responses" adverted to in *Hughes v. Superior Court*, 339 U.S. 460, 465. It is a cardinal trade union principle that their members are not to cross

<sup>14</sup>The N.L.R.B. has recently held that such picketing may be considered tantamount, even, to a present demand for recognition. *Jerome E. Mundy Co., Inc.* (Nov. 2, 1956), 116 NLRB No. 211, 39 LRRM 1029. The instant case would thus clearly fall under the fact and holding of *Building Service Employees v. Gazzam*, 339 U.S. 532.

union picket lines, "organizational" or otherwise.<sup>15</sup> In fact, Petitioners concede<sup>16</sup> that "a picket sign is the traditional symbol of the existence of a labor dispute."

This "signal" effect of the picket sign acquires particular and forceful potency where, as here, the drivers of the trucking companies servicing Respondent are members of one of the very unions which did the picketing. It would indeed be unrealistic and completely artificial to say that, under such circumstances, the purpose of the picket sign was merely to advertise the non-union status of Respondent's employees, or merely to enlist the support of sympathizers. Rather, the picket sign is the "signal" to all union men, and particularly truck drivers, not to cross such picket line, on pain of fines and other discipline.

It is a pure myth to hold that the truck drivers here, or union men in general, were refusing to cross the picket line *voluntarily* or because they were persuaded intellectually by the merits of Petitioners' cause. In actual fact union men will not cross picket lines simply because they fear disciplinary consequences.<sup>17</sup>

<sup>15</sup>See Teller, *supra* Note 11, 56 *Harv. L. Rev.*, at 201; Rothenberg, "Organizational Picketing," 5 *Lab. L. J.* 689, 694 (1954); Gregory, *Labor and the Law*, 347-8 (Rev. Ed., 1949)

<sup>16</sup>Pet. Br. 26.

<sup>17</sup>A. H. Raskin, well-known *Times* labor reporter, in a very recent news article appearing in the *New York Times*, Feb. 2, 1957, p. 1, discusses retaliatory threats by high Teamsters Union officials to discontinue the honoring of picket lines of those labor organizations which are deemed to be hostile to the Teamsters Union. John J. O'Rourke, President of the International Joint Council in New York, is quoted as announcing that he would instruct the 125,000 truck drivers and warehousemen under his jurisdiction to cross picket lines established by unions that "spend all their time kicking our brains out." In like vein, James R. Hoffa, of Detroit, well-known International Vice President of the Teamsters, "and a dominant figure in the truck union's

That this trade union policy (that members are not to cross picket lines) is more than merely a plea directed to the uninhibited discretion of its members, is fully borne out by the prevalence of so-called "hot cargo" clauses<sup>18</sup> in practically all<sup>19</sup> of the Teamsters Union contracts, and in many others.

*As long as labor unions insist upon inculcating the idea in the minds of their members that they must not cross picket lines, whether they be, allegedly, informational, organizational or otherwise, and as long as "hot cargo" clauses are the established practice in labor contracts, Petitioners, and labor organizations in general, cannot be heard to say that picketing constitutes "mere peaceful persuasion," particularly where, as here, the picketing has been preceded by a twelve month period of unsuccessful effort to solicit or "persuade" Respondent's employees to become union members.*

affairs," is reported to have indicated that Teamsters joint councils in other areas would likely adopt the same policy whenever they felt that local leaders of other unions were supporting moves hostile to the Teamsters. Obviously, no such "instructions" are necessary if there are not now in existence directives that Teamsters Union members are not to cross the picket lines of other unions.

Significantly, Mr. Raskin went on to say: "Through their control of deliveries of raw materials and finished products, truck drivers are often the make-or-break element in strikes called by other unions. By ignoring picket lines they can make it impossible for sister unions to win their strikes or organizing campaigns." See also the authorities listed in Note 15, *supra*.

<sup>18</sup>Such clauses grant employees the right to refuse to go through picket lines or to handle "unfair" goods. For a discussion of the importance, impact and extent of "hot cargo" clauses, see elsewhere in this brief, *infra*, p. 43.

<sup>19</sup>See *infra*, p. 43, citing an authoritative statement of, *inter alia*, Petitioners' counsel that "hot cargo" clauses are in existence in Teamster contracts "through the length and breadth of the United States, and have been for many years."

In the light of these clearly established and predictable effects of the picketing, it would be most artificial, and devoid of any realism, to say, as did the trial court (R. 1), that the picketing was directed at the employees in order to persuade them to organize and affiliate with petitioner unions and, therefore, to denominate the Petitioners' conduct as "organizational picketing."<sup>20</sup> We cannot improve upon the words of Professor Rothenberg, who most aptly described this kind of a situation as follows:<sup>21</sup>

"It is sheer mockery to hold that organized labor, which itself devised those strategies, is not aware of the effect of craftily located 'organizational' picket lines—the naming and defaming of employers on the placards and/or the 'signal' effect of the picket line. It is these facts, and not the adroit or clever manipulation of terms and phrases or smirking claims of constitutional exemption, that are the best evidence of intention and, hence, objective \*\*\* Since all experience, the cardinal dogma and the very nature of unionism leads inevitably to the firm conviction that the prime objective is to bring illegal pressure upon the employer, organized labor cannot

<sup>20</sup>It is sometimes claimed that there is a difference between so-called "organizational" picketing and "recognition" picketing. See *Pet. Br.*, p. 31, Note 33. An analysis of the ingredients, nature and objects of the picketing, whether claimed to be for the purpose of organizing the employees or for the purpose of gaining recognition from the employer, completely refutes such an alleged distinction. Petro, "Recognition and Organizational Picketing," 3 *Lab. L. J.* 819, 821; Petro, "Recognition Picketing Under the N.L.R.A.," 2 *Lab. L. J.* 802, 805 (1951); Petro, "Free Speech and Organizational Picketing: —1952," 4 *Lab. L. J.* 3 (1953); Rothenberg, "Organizational Picketing," 5 *Lab. L. J.* 689 (1954); Benetar and Isaacs, "Pickets or Ballots," 40 *A.B.A.J.* 848, 850-2 (1954); Gregory, "Picketing and Coercion: a Defense," 39 *Va. L. Rev.* 1053 (1953); *Blue Boar Cafeteria v. Hotel & Restaurant Union*, 354 U.S. 254, 254 S.W. 2d 335, 339, cert. den. 346 U.S. 834; *Wilbank v. Bartenders Union*, 360 Pa. 48, 60 A. 2d 21, 22, cert. den. 336 U.S. 945.

<sup>21</sup>Rothenberg, *supra* Note 20, at p. 694.

be permitted to preemptorily cancel out the verities and to immunize itself by the tonguing of the term 'organizational.' " (Italics ours).

In the light of these considerations, it is not surprising that the picketing, here, was completely effectual (R. 16) in that Respondent was completely deprived of pick-up and delivery service.<sup>22</sup> The effect of this picketing was thus clearly confirmatory of its primary purpose, as alleged in the Complaint (R. 5-6) and as found by the court below. *Local Union No. 10 v. Graham*, 345 U.S. 192, 200, 201. All the facts and circumstances surrounding the picketing, as disclosed by the record, together with what is common knowledge as to the "signal" effect and efficacy of picketing, and its coercive elements *per se*, confirmed by the actual events, completely sustain Respondent's contention as to its purpose, and entirely refute Petitioners' position which is supported only by what *they say* the purpose was. The character of the picketing must be determined not by Petitioners' bare assertions, but by the quality of their conduct.

3. The Employer Was Subjected to Economic Coercion in Order to Induce It to Intimidate Unwilling Employees into Joining the Union, in Violation of Section 111.06(2)(b).

Petitioners claim that they merely engaged in "peaceful persuasion" when undertaking the picketing in the instant case, but to take such a view is to ignore the stark realities of the situation.

Let us again review the pertinent facts. For about a year Petitioners had been making unsuccessful efforts (R. 8-11, 12, 16) to convince the Respondent's employees

<sup>22</sup>See Note 17, *supra*.

that they should join the union. After failure of these efforts, and only then, did they begin to picket (R. 4). *But the very commencement of the picketing signified the termination of activities which could be called "peaceful persuasion"*: The coercive and intimidating element was added. *Thomas v. Collins*, 323 U.S. 516, 538-9.

Nor can it be honestly maintained that the purpose of the picketing was for information. Needless to say, *employees* who for a year were the objects of unsuccessful union solicitations need not be "informed" that they are "not\*\*\* affiliated with the A.F.L." (R. 36). They already know that! Likewise, the *employer* unquestionably is aware of the "unorganized" status of its employees, for no bargaining or recognition demands had been made upon it. And the *general public* could not possibly have been the target of the messages on the picket signs, since the "general public" did not frequent to any substantial extent a lonely town road P in rural Waukesha County where Respondent's gravel pit is located (R. 3, 16, 35, 36).

Since the pickets, clearly, were not employed, primarily, either for the persuasion of employees or for the dissemination of information, their only possible object could, and must, have been to produce the very effect which, as previously pointed out, Petitioners knew would result. "The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the" Respondent. *Local Union No. 10 v. Graham*, 345 U.S. 192, 201.

This places the case squarely under the well-established common law rule that one must be held with having *intended* the foreseeable consequences of one's conduct, i. e., that which reasonable men would normally anticipate to flow from such conduct. *Radio Officers Union v.*

*N.L.R.B.*, 347 U.S. 17, 47; cf., *Aikens v. Wisconsin*, 195 U.S. 194, 205; *Local Union No. 10 v. Graham*, *supra* at 200. As was said by the Court below in *Estate of Grossman*, 250 Wis. 457, 461, 27 N.W. 2d 365, 367:

"The intention of the parties to any particular transaction may be gathered from their acts and deeds, in connection with the surrounding circumstances, as well as from their words \* \* \*."

Applying these principles to the instant situation, the unions here must be deemed to have intended those results and effects falling upon the neutral employer, Respondent herein, which would foreseeably and naturally result from their acts of picketing. That Respondent would be completely cut off from its sources of supply, to its great damage and injury, was clearly foreseeable by Petitioners and, therefore, they must have intended such result. In view of their prior unsuccessful acts of non-coercive persuasion, there can be no doubt that Petitioners engaged in picketing for an unlawful purpose, viz., in order to induce Respondent, by coercive means, to intimidate its employees to join the union. To ignore such a realistic appraisal of the facts would make a nullity, an empty gesture, out of the right, guaranteed to employees by Sec. 111.04, Wis. Stats. (1953), to join or to refrain from joining a labor organization.<sup>23</sup>

<sup>23</sup>See Petro, "Recognition and Organizational Picketing," 3 *Lab. L. J.* 819, at 821 (1952): " \* \* \* In 'organizational picketing' the union deliberately inflicts economic harm upon the employer as a means of inducing the employees to become members and to choose the picketing unions as exclusive bargaining representative. This type of picketing, like recognition picketing, beyond any doubt amounts to a deliberate infliction of harm, in fact, upon both the employer and the reluctant employees; like recognition picketing, indeed like all picketing, it tends to cut off the employer from his vital markets and thus to threaten both the business involved and, derivatively, the employment of its employees." And see Røthenberg, "Organizational Picketing," 5 *Lab. L. J.* 689, 694 (1954).

It has been established that, by means of coercive pressure exerted upon the employer, with its perfectly foreseeable consequences, Petitioners intended to cause a cessation of the pick-up and delivery service, thus cutting off its business from its sources of supply. But the strangulation of a business by such methods certainly cannot be considered a natural or logical method of "persuading" employees to join the union — it is a *modus operandi* calculated to affect directly, not the employees, but the employer in order to compel it to coerce its employees<sup>24</sup> in their rights of self-organization.

**C. If the Injunction Were Dissolved, the Employer Would Have to Choose Between Loss of Its Business or Violating the Law.**

We submit that if the picketing here in question were found to be non-enjoinable, under the facts disclosed by the record, the employer would be placed in the anomalous position of either having to violate the law of Wisconsin or, in the alternative, suffer economic ruin. This was recognized by the court below when it found

<sup>24</sup>Compare speech of N.L.R.B. General Counsel, Theophil C. Kammholz, before Institute of Management and Labor Relations, Rutgers University, November 27, 1956 (NLRB Release No. R-513, p. 15), where he pointed out that "it is settled" that when a minority union pickets for exclusive recognition, it "is trying to persuade the employer himself to commit an unfair labor practice." See also *Shepherd Machinery Co.*, N.L.R.B. Case Nos. 21-CB-805 and 21-CC-229 (Trial Examiner's Intermediate Report, Nov. 6, 1956), where it was pointed out (p. 8) that when a union pickets an employer whose employees had previously repudiated such union at the polls, the picketing was for the purpose of coercing the employer and the employees in the exercise of their rights guaranteed by Section 7 of the Federal Act. (Section 7 is analogous to Sec. 111.04, Wis. Stats. (1953)). Accord: *Alloy Manufacturing Co.*, N.L.R.B. Case No. 19-BC-430 (Intermediate Report, Jan. 15, 1957) 39 LRR 205, 206. The General Counsel of the N.L.R.B., thus, no longer adheres to the position taken in earlier years, adverted to by Petitioners (Pet. Br. 32 n. 34).

that the picketing had been undertaken for an unlawful purpose (R. 36). In a situation such as here, an employer has open to it only two means, and none other, by which to extricate itself from the controversy and its economic consequences, a controversy into which it was drawn unwittingly and involuntarily:

(1) The employer can recognize and deal with the union, or it can force or induce its employees to join the union, and if it were to engage in either or both of these acts it would be violating subsections (a), (b), (c) and (e) of Sec. 111.06(1), Wis. Stats. (1953) (App., *infra*, p. 58-9). It would, thereby, be depriving its employees of their right to free choice with respect to union representation.

(2) Or it can permit the continuance of the picketing, suffer the vast economic losses engendered thereby, and, eventually, be compelled to go out of business altogether, thereby reducing its employees' earnings, even to depriving them of their livelihood. Few can endure for any length of time the damage and injury caused by strangulation of transport services.<sup>25</sup>

When an employer is faced with such a dilemma as here, where the only way to escape the picketing and its consequences is by violating the law, this Court has not hesitated to uphold a state's proscription of the picketing. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 493; *Building Service Employees v. Gazzam*, 339 U.S. 532, 540. If the picketing were held to be constitutionally protected, it would enable a union effectively to put an em-

<sup>25</sup> Especially in view of this second alternative, an employer would be deprived of property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution if the picketing were held to be non-enjoinable. The employer would have no remedy to fight so obvious a wrong. For a fuller discussion of this issue, see *infra*, p. 49ff.

*ployer out of business whenever his employees exercised their right, guaranteed them by Sec. 111.04, Wis. Stats.,<sup>26</sup> to refrain from joining a labor organization!*

#### D. Petitioners' Claim That the Facts Would Not Support a Finding of Unlawful Purpose Is Unreal and Without Merit.

In their brief, Petitioners argue that the evidentiary facts<sup>27</sup> could not support a finding of unlawful purpose. The thorough analysis made of these facts earlier in this brief clearly disprove such an assertion. Petitioners refuse (Pet. Br. 22-30) to consider all of the facts as a whole, in their totality, and argue that a finding of unlawful purpose was not justified solely on the basis of a consideration of each factual ingredient or facet, *standing alone*.

Thus, they attempt to equate the fact of unsuccessful solicitation followed by picketing with unsuccessful pamphleteering followed by publication of a newspaper ad (Pet. Br. 23). But advertising in a newspaper or pamphleteering is not on a par with picketing, peaceful or otherwise. *Hughes v. Superior Court*, 339 U.S. 460, 464-5.

Respondent does not contend that solicitation of employees by a union is in any way unlawful, as Petitioners

<sup>26</sup>To the same effect, Section 7, National Labor Relations Act, as amended, 29 U.S.C.A. § 157.

<sup>27</sup>Throughout their brief, petitioners refer to "undisputed evidence." In reality, the facts here are not undisputed, as becomes apparent upon an examination of the Complaint (R. 3), and of the Answer (R. 12) herein. While many of the facts alleged by Plaintiff were admitted or uncontradicted, by defendants below, the primary reason why the Wisconsin Supreme Court made its own findings on review was because the record consisted of "no more than pleadings and affidavits" (R. 37), and contained no oral testimony.

appear to imply (Pet. Br. 22-23). It is submitted that unsuccessful solicitation—where, as the trial court found (R. 16), the employees indicated that they did not desire to join the union and, at the time of the trial, had continued to refuse to become members of the unions—followed by picketing at a locale where there can be no question but that such picketing was directed only at the employer, does not constitute “peaceful persuasion” or merely the communication of ideas. It is coercive intervention, based on the economic sanctions inherent in the picketing.

The gravamen of the unlawfulness of the picketing here is not that one means of communication (solicitation) followed another alleged mode of communication, but that an activity inherently coercive followed the *unsuccessful* attempts to persuade the employees to join the union.

Nor is it the size of the audience, or the locale, as such, of the picketing, which led the Wisconsin Supreme Court to find that the picketing was undertaken for an unlawful objective. It was from the situs of the picketing that the Wisconsin Court inferred, quite naturally, that the composition of the potential audience was such that the picketing could have been directed only against the employer, because of the “signal” effect which it had, and foreseeably would have, upon union truck drivers and their confederates. Since both the employer and the employees were well aware of the message which the picket signs purported to convey, the finding of the Court below (R. 35-36) that the purpose of the picketing was to coerce the Respondent to cause it to compel or induce its employees to become members of Petitioners is the only one realistically possible under the circumstances.

Petitioners claim (Pet. Br. 27) that the finding, below, was based upon the fact that economic loss "might induce the employer to violate the law." Such a statement, however, does not tell the whole story. The employer could disentangle itself from the picketing only if it violated the law by coercing its employees to join the union. See *supra*, p. 22.

It was not economic loss, standing alone, which was considered by the Wisconsin Supreme Court in finding the existence of an unlawful purpose, but the fact of economic loss in the light of *all* of the circumstances present in the instant controversy; it was the picketing, foreseeably resulting in economic loss, coupled with the fact that the picket line here could not possibly have any other effect. Such effect was confirmatory of its purpose. *Local Union No. 10 v. Graham*, 345 U.S. 192, 200.

Petitioners interpret the decision of the Court below (Pet. Br. 33) as holding that whenever the employees of the picketed establishment are not members of the picketing union, then the picketing is to have been undertaken for the purpose of coercing the employer to induce its employees to join the union. In truth, however, it was found that the picketing was done for such a purpose on the basis of numerous *other* facts, all analyzed by the Court below in great detail (R. 35-36).

In brief, it is not each isolated facet of the factual situation which, as we have said, determines, standing alone, whether the finding of the Court below was warranted; it is a consideration of all of the facts and of the natural and reasonable inferences flowing therefrom which establish the correctness of the finding.

Indeed, the Wisconsin Court is not alone in arriving at such a conclusion under the facts disclosed by the

record. Many other courts have also recognized the coercive nature, *per se*, of picketing conducted under circumstances similar to those here present, and found it to have been engaged in for an unlawful object, viz., for the purpose of coercing the employer to induce or force its employees to join a union. *Pappas v. Stacey*, 151 Me. 36, 116 A. 2d 497, 500, *appeal dismissed* 350 U.S. 870; *Postma v. Teamsters Union*, 334 Mich. 347, 54 N.W. 2d 681, 684, *cert. den.* 345 U.S. 922; *Audubon Homes, Inc. v. Spokane Bldg. & Const. Trades Council*, — Wash. —, 298 P. 2d 1112, *cert. pending* No. 618; *Blue Boar Cafeteria v. Hotel & Restaurant Union*, — Ky. —, 254 S.W. 2d 335, 339, *cert. den.* 346 U.S. 834; *Miami Typographical Union v. Ormerod*, (Fla. 1952) 61 So. 2d 753; *Baderak v. Bldg. Trades Council*, 380 Pa. 477, 112 A. 2d 170, 173; *Sansom House v. Waiters Union*, 382 Pa. 476, 115 A. 2d 746, 750, *cert. den.* 350 U.S. 896; *Tallman Co. v. Latal*, Mo. Sup. Ct. (Div. No. 2), No. 43437, March 8, 1954, 33 LRRM 2725, 2729, 25 CCH Labor Cases, Par. 68,207; *Boca Raton Club v. Hotel Union*, — Fla. —, 83 So. 2d 11, 16; *Fairlawn Meats Inc. v. Meatcutters Union*, 99 Ohio App. 517, 135 N.E. 2d 689, *cert. granted* 351 U.S. 922; *Anderson v. Local No. 698, Retail Clerks Union*, — Ohio App. —, 38 LRRM 2324, 30 Labor Cases, Par. 70,185, *appeal dismissed* 165 Ohio St. 512, 137 N.E. 2d 752.

One would be credulous, indeed, to believe that the appellate courts of the several states are engaging in the practice of making "spurious" findings, without any factual support from the respective records. The only reason why Petitioners<sup>28</sup> claim that the findings of the Court

<sup>28</sup>and the American Federation of Labor and Congress of Industrial Organization in its brief *amicus curiae*.

below, and those of other courts, were not supported by the evidentiary facts is because they would have us continue to believe in the fiction that picketing is to be nearly always equated with free speech and that, under the circumstances of this case, it was done solely for advertising and for peaceful persuasion. Such a view of the picketing, under present-day circumstances, is surely unsound, naïve and devoid of realism.

## II.

### THERE ARE NO EXCEPTIONAL CIRCUMSTANCES JUSTIFYING THIS COURT TO REJECT THE FINDINGS OF THE WISCONSIN SUPREME COURT.

We do not quarrel with the proposition that this Court has the power to search the record and examine the finding of the court below where constitutional questions are involved, but that does not mean that this Court will re-examine, as a court of first instance, findings of fact of state supreme courts. *Norton Co. v. Department of Revenue*, 340 U.S. 534, 538. Such independent examination is made by this Court only where "exceptional circumstances" are present. Here, "there are no exceptional circumstances of any kind that would justify [this Court] in reviewing the Supreme Court's findings. *They are not without factual foundation,*" and this Court should accept them. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160. Ordinarily, this Court will not re-examine a state court's findings and conclusions of fact. *Grayson v. Harris*, 267 U.S. 352, 358; *Portland R. Co. v. Railroad Commission*, 229 U.S. 397, 412; *Fry Roofing Co. v. Wood*, *supra*. B

Petitioners claim. (Pet. Br. 13) that because the facts are allegedly undisputed in the instant case, this Court should make its own independent analysis and draw its own inferences as to their ultimate effect. The fact of the matter is, however, that the findings of the court below were not based upon facts which were entirely undisputed.<sup>29</sup> See *supra*, p. 24, Note 27.

In order for this Court to disregard the finding of the court below, the latter must have clearly and obviously ignored a constitutional mandate when making its own findings, as stated by this Court in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, at 293-4:

"\*\*\* It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. *We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority.*" (Emphasis supplied)

Petitioners, on two separate occasions (Pet. Br. 8, 36), have characterized the finding made by the Supreme

<sup>29</sup>Petitioners argue (Pet. Br. 13, Note 5) that the Wisconsin Supreme Court substituted its own findings for those of the trial court because the facts were allegedly undisputed. However loose the language referred to by Petitioners, in actuality the Wisconsin Supreme Court supplied its own findings—not because of allegedly undisputed facts—but because the trial court's findings were based solely upon *pleadings and affidavits* and in the absence of any oral testimony (R. 37, 38). This principle, invoked by the court below, is also applied in the Federal courts. 2 Barron & Holtzoff, *Federal Practice and Procedure*, (1950), Sec. 1134, p. 849. *Orvis v. Higgins* (C.A. 2), 180 F. 2d 537, 539, *cert. den.* 340 U.S. 810.

Court of Wisconsin as being "spurious."<sup>30</sup> We submit that the facts of this case, as disclosed by the record, and the reasonable and natural inferences deduced therefrom, fully support the finding made by the court below — as the only one possible under the circumstances. There is no justification whatever for imputing to one of the outstanding state courts of last resort so sinister and irreverent a scheme. The finding of the Wisconsin Supreme Court was not "counterfeit," it was not "false."

The Court below found that Petitioners' conduct violated Sec. 114.06(2)(b), Wis. Stats. (1953). That statute was part of the declared public policy of the state which embraced the "\*\*\*\* State's social and economic policies, which, in turn, depend on knowledge and appraisal of local social and economic factors \*\*\*." *Teamsters Union v. Hanke*, 339 U.S. 470, 474-5. "When the highest court of a state has reached a determination upon such an issue, \*\*\* most respectful attention to its reasoning and conclusions" is given to it by this Court. *Pennekamp v. Florida*, 328 U.S. 331, 335. "\*\*\*\* a judgment on these matters comes to this Court bearing a weighty title of respect." *Teamsters Union v. Hanke*, *supra*, at 475.

This Court has laid down the policy that

"It is not for this Court to deny to a State the right, or even to question the desirability, of fitting its law to a concrete situation through the authority given \*\*\* to its courts.' \*\*\* It is particularly important to bear this in mind in regard to matters affecting industrial relations which, until recently, have been left largely to judicial lawmaking and not to legislation.'"

<sup>30</sup>Webster's New International Dictionary (2d Ed., 1951) defines "spurious" as "Not proceeding from the true source or from the source pretended; not genuine; counterfeit; false."

*Hughes v. Superior Court*, 339 U.S. 460, 467. Wisconsin has done no more than follow this principle.

The Wisconsin Supreme Court has "the final say concerning the meaning of a Wisconsin law," and in deciding whether the finding of that Court was justified, this Court is "controlled by the construction placed by the Supreme Court of Wisconsin upon the order and the pertinent provisions of the Act." *Hotel & Restaurant E. I. Alliance v. W.E.R.B.*, 315 U.S. 437, 438, 440-1.<sup>31</sup>

### III.

## THE PICKETING, HERE, IS NOT IMMUNE FROM RESTRAINT AS CONSTITUTIONALLY PROTECTED FREE SPEECH.

### A. When Peaceful Picketing is Undertaken for a Purpose Made Unlawful by State Policy, It May be Enjoined.

This Court first intimated in *Senn v. Tile Layers Union*, 301 U.S. 468, 478, (1937), that peaceful picketing was protected as free speech under the First and Fourteenth Amendments to the Constitution. Subsequently, that doctrine received more sweeping and forceful expression in *Thornhill v. Alabama*, 310 U.S. 88; *Carlson v. California*, 310 U.S. 106; and *A.F.L. v. Swing*, 312 U.S. 321. In the latter case the "picketing-free speech" principle may be said to have reached its apex, for in *Bakery Drivers' Local v. Wohl*, 315 U.S. 769, 775, this

<sup>31</sup> Petitioners assert that the picketing was directed at Respondent's employees. Although, under the circumstances present, such could not possibly have been the true purpose, it should be noted that the Court below has not construed the Wisconsin statute to "prohibit the picketing of workers by other workers" and the decree does not have that effect. Cf. *Building Service Union v. Gazzam*, 339 U.S. 532, 539-40.

Court warned that where picketing was attended by " \* \* \* , coercion, or conduct otherwise unlawful or oppressive" it might be subject to restraint notwithstanding the Fourteenth Amendment. The same decision recognized (p. 776), for the first time, that "picketing by an organized group is more than free speech" which makes it " \* \* \* the subject of restrictive regulation." In *Thornhill* this Court had used broad language, thereafter often interpreted as equating picketing with speech,<sup>32</sup> for the purpose of holding unconstitutional an Alabama statute which prohibited all picketing, without exceptions as to either the number of pickets, their demeanor, *the nature of the dispute* or the accurateness of the message conveyed.<sup>33</sup>

Other cases following in the footsteps of the *Wohl* case, strongly indicated that the constitutional protection of picketing was not without limitations. *Cafeteria Employees Union v. Angelos*, 320 U.S. 293; *Thomas v. Collins*, 323 U.S. 516. In the latter case, this Court cautioned (p. 538-9) that when to persuasion "other things are added which bring about coercion, or give it that character, the limit of the right" guaranteed by the Constitution has been passed.

Respondent submits that the broad concept of the constitutional protection attached to picketing, set forth in these cases, may have arisen, and probably did arise, as a result of the conditions prevailing in the years before and

<sup>32</sup>The *Thornhill* decision and the picketing-free speech cases immediately following, have been frequently criticized. Corwin, Book Review, 56 *Harv. L. Rev.* 484, 486 (1943); and see Professor Corwin's comment in *The Constitution and What It Means Today*, 197 (10th ed., 1948); Gregory, *Labor and the Law* 349 (Rev. ed., 1949); Gregory, "Peaceful Picketing and Freedom of Speech," 26 *A.B.A. J.* 709 (1940).

<sup>33</sup>Cf., *Teamsters Union v. Hanke*, 339 U.S. 470, 474 n. 1.

immediately following the enactment of the Wagner Act<sup>34</sup> when the opportunities, bargaining power and social and economic status of organized labor were at a low ebb. At any rate, since that time this Court has issued a series of decisions<sup>35</sup> which make it clear that picketing *per se* is not to be equated with Constitutionally protected free speech and that there still exist many situations in which the states could properly exercise their authority in limiting the right to picket.

In the meantime, during that very period, organized labor grew substantially in numbers, wealth, bargaining position, and greatly improved its social, economic and political status. That growth, discussed subsequently herein (*infra*, p. 39ff.), undoubtedly must have been considered by this Court in subsequent decisions. As a parallel development, some of the states, including Wisconsin, in an attempt to channel the combative forces of employer-union competition through orderly and well-regulated processes of justice towards peaceful industrial relations, enacted comprehensive labor relations laws which placed certain restrictions upon all concerned, employer, employees and unions (*see infra*, p. 44ff.). As one of their principal objectives, these laws guarantee employees the right to self-organization and the right to join or not to join a labor organization, free of interference and coercion from any source.<sup>36</sup>

<sup>34</sup>49 Stat. 449 (1935).

<sup>35</sup>*Hotel & Restaurant E. I. Alliance v. W.E.R.B.*, 315 U.S. 437; *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490; *Hughes v. Superior Court*, 339 U.S. 460; *Teamsters Union v. Hanke*, 339 U.S. 470; *Building Service Employees v. Gazzam*, 339 U.S. 532; *Local Union No. 10 v. Graham*, 345 U.S. 192.

<sup>36</sup>See Secs. 111.01 and 111.04, Wis. Stats. (1953), App. *infra*, pp. 57-8; Sec. 7 of the N.L.R.A., as amended, (29 U.S.C.A., Sec. 157) is analogous.

Picketing which tends to interfere with these rights by inflicting coercive pressure, either upon the employer so as to compel him to violate these rights, or directly upon the employees, obviously is undertaken for an object violative of such policy. It is precisely this type of picketing which the Wisconsin Supreme Court has enjoined, for that Court found, after a thorough analysis of the facts (R. 35, 36), that the picketing here had been engaged in for the purpose<sup>37</sup> of coercing the employer to compel its employees to join or be represented by petitioner unions.

This holding of the Court below is not at all inconsistent with the view taken, more recently, by this Court of picketing and of the right of the State to control it. Indeed, it has been held that picketing is more than speech and usually does produce results not ordinarily associated with the mere dissemination of ideas:

"But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.' [Citing cases] Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."

<sup>37</sup>Made unlawful by Sec. 111.06(2)(b), Wis. Stats. (1953); App. *infra*, p. 59.

*Hughes v. Superior Court*, 339 U.S. 460, 464-5. To the same effect, *Teamsters Union v. Hanke*, 339 U.S. 470, 474; *Building Service Employees v. Gazzam*, 339 U.S. 532, 536-7. When picketing brings about coercion or gives it that character, it ceases to be protected by the Constitution, *Thomas v. Collins*, 323 U.S. 516, 538-9, and is then subject to control by the State. And, again, in *Hughes v. Superior Court*, *supra*, at 465:

“\* \* \* And we have found that because of its element of communication picketing *under some circumstances* finds sanction in the Fourteenth Amendment. [Citing cases.] However general or loose the language of opinions, the specific situations have controlled decision. *It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance.* [Citing cases] A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual.” (Emphasis supplied)

Cf., *Teamsters Union v. Hanke*, *supra*, at 474-5; *Building Service Employees v. Gazzam*, *supra*, at 537.

Certainly a State is free to adopt a policy condemning coercive interference with free employee choice of bargaining representatives and a State can prohibit such coercive interference by unions as well as by employers.<sup>38</sup>

The picketing, having as its purpose a desire to injure the Respondent so as to induce it to commit an unlawful act, was clearly engaged in for an unlawful purpose.

<sup>38</sup>Petro, “Free Speech and Organizational Picketing in 1952,” 4 *Lab. L. J.* 8 (1953).

Consequently, the action of the Court below did not conflict with constitutional guaranties.<sup>39</sup>

# 1. The Picketing, Here, Was Not Enjoined Because of the Absence of an Employer-Employee Dispute.

Petitioners assert (Pet. Br. 30 ff.) that the decision of the Court below, in fact, was based on the alleged absence of an employer-employee dispute and they rely especially upon *A.F.L. v. Swing*, 312 U.S. 321 and *Bakery Drivers Local v. Wohl*, 315 U.S. 769, as authority for their claim that such decision violated the free speech guaranties of the Constitution.

It should be pointed out that Respondent's complaint alleged (R. 6) that Petitioners' conduct was violative not only of Sec. 103.535<sup>40</sup>, but also of Sec. 111.06(2) (b), Wis. Stats. (1953). The decision and the findings of the trial

<sup>39</sup>See cases cited in Note 35, *supra*.

<sup>40</sup>Sec. 103.535, Wis. Stats. (1953), provides:

"103.535 *Unlawful conduct in labor controversies*. It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employes, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employes or their representatives."

Sec. 103.62(3), Wis. Stats. (1953), referred to in Sec. 103.535, provides:

"(3) The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

court (R. 1-2, 15-18) rested solely upon a conclusion that Sec. 103.535 had been violated.<sup>41</sup> The first opinion of the Wisconsin Supreme Court likewise was predicated upon a violation of Sec. 103.535, Wis. Stats. (1953). (R. 24).

The second decision of the Wisconsin Court, however, was not at all based upon a violation of Secs. 103.535 and 103.62(3), Wis. Stats. (1953), but involved the question, exclusively (R. 29), whether the facts, and the natural inferences deducible therefrom, would support a finding that Sec. 111.06(2)(b), Wis. Stats. (1953) had been violated. After a thorough analysis the Court below so found. (R. 30, 35-6).

The Wisconsin Supreme Court's judgment, therefore, is *not* grounded on the absence of a labor dispute between the employer and its employees, i.e., is not based upon a violation<sup>42</sup> of Secs. 103.535 and 103.62(3), Wis. Stats. (1953). It is particularly noteworthy that the Court below specifically held (R. 41):

"Our decision is not to be construed as holding that the state may forbid peaceful picketing solely because there is no immediate employer-employee dispute as was held in the *Swing* case."

<sup>41</sup>The trial court had rejected a finding that Sec. 111.06(2)(b) had been violated, (R. 25, 35).

<sup>42</sup>Sec. 103.535 was held unconstitutional in *City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N.W. 2d 416, decided on the same day as the first opinion of the Wisconsin Supreme Court in the instant case. In that case the Wisconsin Court pointed out that there was lacking a formal finding by the trial court, or a demand for one, that the picketing had been undertaken for an unlawful purpose. The Court intimated, as did this Court in *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 775, that had the record contained a finding of unlawful purpose it might have reached a different result. In the *City of Waukesha* case, as in the first opinion of the instant case, the decision rested exclusively upon the absence of an employer-employee dispute.

As stated, in *Hotel & Restaurant E. I. Alliance v. W.E.R.B.*, 315 U.S. 437, 440-1, under similar circumstances, what is before this Court is the opinion and finding of the Wisconsin Supreme Court which has, of course, the final say concerning the meaning of Wisconsin law. "And that Court has unambiguously rejected the construction upon which the claim of Petitioner rests." Cf., *City of Waukesha v. Plumbers Local No. 75*, 270 Wis. 322, 71 N.W. 2d 416.

The facts and applicable statutes totally distinguish the instant case from *A.F.L. v. Swing*, *supra*,<sup>43</sup> and *Bakery Drivers Local v. Wohl*, *supra*. The instant case must, therefore, be distinguished from *Swing* exactly as this Court distinguished *Swing* in the *Gazzam* case, 339 U.S. 532, at 539:

"Petitioners insist that the *Swing* Case, 312 U.S. 321, *supra*, is controlling. We think not. In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any lawful purposes is not prohibited by the decree under review. The state has not here, as in *Swing*, relied on the absence of an employer-employee relationship. Thus the state has

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<sup>43</sup>The *Swing* case, in particular, appears to have lost its vitality. In *Swing*, the union officials had called upon the employer and "demanded that he require all of his employees to join that union, to which none of them belonged, and to which none of them wished to belong." See *Swing v. A.F.L.*, 372 Ill. 91, 22 N.E. 2d 857. These facts describe a situation, involving union demand for recognition, exactly as was present in *Building Service Employees v. Gazzam*, 339 U.S. 532. Based upon this analysis of the facts, the *Gazzam* case must be deemed to have emasculated the *Swing* rule, at least with respect to situations controlled by statutes such as were present in the *Gazzam* case and in the case at bar. Illinois had no such statute.

not, as was the case there, excluded 'workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' 312 U.S. at 326."

Moreover, since there *were* here facts and circumstances from which the Court "can draw the inference that the [picketing] was attended or likely to be attended by \* \* \* coercion or conduct otherwise unlawful or oppressive," the *Wohl* case is here not controlling, either. 315 U.S. at 775.

## B. The Circumstances Relating to Labor Relations Have Changed Greatly Since *Senn* and *Thornhill*.

### 1. Labor Unions Have Grown Vastly in Size and Economic Power.

In passing upon the constitutional issue here presented, this Court must, of necessity, consider the existing state of our social and economic environment and must strike a balance between competing economic interests as they affect present-day industrial society.

This Court has always been careful to point out in its earlier decisions relating to picketing and free speech that, in deciding the issues there involved, it took into consideration the *then* existing social and economic conditions and the conditions found to be existing in the field of industrial relations. Thus, in *Thornhill v. Alabama*, 310 U.S. 88, this Court called attention to (p. 102) "the circumstances of our times" and to (p. 103-4) "the interests of the society in which they exist." Mr. Justice BRANDEIS,

dissenting in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488, spoke of "the conditions [then] developed in industry." In *Teamsters Union v. Hanke*, 339 U.S. 470, 475, Mr. Justice FRANKFURTER referred to the then existing "local social and economic factors" and pointed out, at 479-80, that the established policy of a state relating to picketing must be considered realistically "in the light of modern circumstances, to what constitutes an industrial relationship or a labor dispute." Consequently, this Court has felt itself under a duty "to restrict expressions in opinions in earlier cases to their specific context." *Teamsters Union v. Hanke*, *supra*, at 480 n. 6.

It hardly needs reference to authorities to point out that the "context," the social and economic balance of power in industrial society, has vastly and decisively changed since this Court handed down its decisions in the earlier free speech cases, beginning with *Senn v. Tile Layers Union* (1937), 301 U.S. 468, and including *Thornhill v. Alabama* (1940), 310 U.S. 88.<sup>44</sup> No longer are labor organizations, and their members, helpless and impotent in relation to industry and employers in general, as noted by Mr. Chief Justice TAFT in *American Steel Foundries v. Tri-City Central Trades Council* (1921), 257 U.S. 184, 209-10. Organized labor has long since come of age and has "become a national economic force"<sup>45</sup> of major proportions. During the fifty year period, 1900-1950, union strength experienced a growth of more than 1400%, rising from 868,500 members in 1900 to 13.3

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<sup>44</sup>For a description of the economic and political factors, affecting labor, existing in 1940, see Charles O. Gregory, Book Review, 36 *Va. L. Rev.* 409 ff. (1950).

<sup>45</sup>"1935-1955: Twenty Years of Growth," 16 *Economic Outlook* 89, 91 (Dec., 1955), published by the Department of Education & Research of the Congress of Industrial Organizations.

million in 1950. In 1940 the unions in the United States had an actual membership of 7.87 million, thus indicating a growth, in the decade to 1950, of 69%.<sup>46</sup> The C.I.O.'s Department of Education & Research reports that organized labor in the U.S., in 1955, had about 17 million members.<sup>47</sup> A 1956 study of the National Bureau of Economic Research discloses that, by 1953, labor unions had organized 38.3% of the non-farm workers in Wisconsin.<sup>48</sup>

It is thus clearly apparent that labor organizations have had an immense growth, particularly since World War II, and are able to, and do, exert economic and social influence and power easily on a par with industry, or with any other segment of our society.<sup>49</sup>

Particularly noteworthy is the spectacular growth in power, numbers and strength which was had by the International Brotherhood of Teamsters, of which Local 695, one of the petitioners herein, is an integral part. "The growth of membership in the Teamsters Union has been phenomenal, especially in the past few years. \* \* \* It is

<sup>46</sup>Solomon, "Dimensions of Union Growth—1900-1950," 9 *Industrial and Labor Relations Review* 544, 546-7 (July, 1956).

<sup>47</sup>16 *Economic Outlook*, *supra* Note 45, at 91.

<sup>48</sup>"New Figures Show Union Growth," *The Nation's Business*, Oct. 1956, pp. 80-81.

<sup>49</sup>Irving Bernstein, in "The Growth of American Unions," 44 *American Economic Review* 301, (June 1954), points out, at p. 318:

"Since 1946, rather than exhibiting 'saturation,' the labor movement has grown steadily at approximately the long term rate. Further, in the year 1951, it spurted forward under the impact of the Korean War. If the forces we have emphasized continue at work in the future, unionism will grow steadily in the long run, will suffer little or no loss in bad times, and will expand sharply if we are so unfortunate as to engage in wars or to sustain severe depressions."

See also Lindblom, *Unions and Capitalism*, (New Haven, 1949).

not only the biggest, but, because of the nature of its strategic position in industry, the most powerful of unions."<sup>50</sup> The stranglehold that this union can exert on the entire economy is at once apparent if one considers that it has organized, or exerts control over, practically the entire motor truck transportation in the United States. Our interdependent economic organization would hopelessly collapse if our national transportation system failed in any of its segments as the result of any action undertaken by this union. "Beck's"<sup>51</sup> union has the power to make or break strikes, in other unions and in hundreds of industries. He can, and has, strangled single areas piecemeal."<sup>52</sup>

<sup>50</sup>Bell, "The Teamsters: Big Unionism," 27 *Current History* 36, 37 (July, 1954). It is there pointed out that from a membership of 70,000 in 1933 that union grew to over 500,000 members in 1940, and to 1.3 million in Spring of 1954, then already the largest and strongest unit within the American Federation of Labor. In 1954 its treasury was said to hold in excess of \$32 millions. — More recently, it was reported in the *New York Times* (Jan. 27, 1957, Section 4, p. 7) that the Teamsters' treasury had reached \$37,188,000 in 1956.

In a speech made on December 16, 1956, before a stewards' graduation class of Teamsters Local 200, Milwaukee, Wisconsin, John T. O'Brien, International Vice President, stated that the Teamsters Union was now the largest labor organization in the country "and quite likely the biggest in the world." He further said that the union was now paying a per capita tax "on over 1½ million members to the AFL-CIO" and predicted continued growth in all parts of the country. Reported in *Milwaukee Labor Press*, December 20, 1956.

<sup>51</sup>Dave Beck, President of the International Brotherhood of Teamsters.

<sup>52</sup>Bell, *supra*, Note 50, at pp. 38-40. For a more recent analysis of the Teamsters Union, see Gillingham, *Teamsters Union on the West Coast*, University of California, Berkeley (1956). A. H. Raskin, in a very recent article appearing in the *New York Times*, Jan. 27, 1957, Section 4, p. 7, characterizes the position of the Teamsters Union in these words: "Like the circulatory system that carries the blood to all parts of the human body, the teamsters occupy a position in organized labor far more pervasive than their size. — Humility never has been an outstanding trait among leaders of the truck union. In virtually every community, they have used their great power to reach out for more power. • • •"

This potentially strangling control which the Teamsters Union, and its locals, can and frequently do exercise over movement, by motor trucks,<sup>53</sup> of the goods, materials and supplies required in commerce and industry, as a means of accomplishing union policies and objectives regardless of their nature, is perhaps best exemplified by the "hot cargo" clause which is to be found in practically all labor contracts to which the Teamsters Union, and its locals, are parties.<sup>54</sup> Only recently, counsel for the Teamsters Union pointed out authoritatively that "the ['hot cargo'] clause constitutes one of the most important subjects of the collective bargaining agreement \* \* \* and is of *inestimable value* to" the union. (Emphasis supplied). Such clauses are said to be "in existence in collective agreements between teamsters unions and common carriers throughout the length and breadth of the United States, and have been for many years."<sup>55</sup>

It is in the light of these well-known facts relating to the present-day power and importance of labor organizations, and of the Teamsters Union in particular, that this

<sup>53</sup>Also by railroad, to the extent that truck transportation is required between railroad station and business establishments.

<sup>54</sup>Such contract clauses, *inter alia*, specifically grant truck drivers the right to refuse to go through picket lines or to handle "unfair" goods. See *Conway's Express*, 87 N.L.R.B. 973, *aff'd* (C.A. 2), 195 F. 2d 906, 912; *Sand Door & Plywood Co.*, 113 N.L.R.B. 1210, 1214-16; *Meier & Pohlman Furniture Co. v. Gibbons* (C.A. 8), 233 F. 2d 296, 307, *cert. den.* 352 U.S. 879; "Hot Cargo Clauses and the Taft-Hartley Act," 24 *Geo. Wash. L. Rev.* 673 (June 1956). As to the practical effect of the "hot cargo" clause upon the instant situation, see p. 17, *supra*, of this brief.

<sup>55</sup>Pp. 2-3 of 'Petition for Leave to Intervene' of Teamsters Local 886, submitted to the Interstate Commerce Commission on June 5, 1956 by, *inter alia*, Counsel for Petitioners, herein, and by the General Counsel of International Brotherhood of Teamsters, in re *Galveston Truck Line Corporation v. Ada Motor Lines, Inc.*, I.C.C. Docket No. MMC 1922.

Court must view the declared public policy of Wisconsin in regard to labor relations and industrial disputes as enunciated in its statutes and the pronouncements of its Courts, including the decision here under review.

2. Wisconsin Has Enacted Comprehensive Labor Relations Statutes, Making Unnecessary a Resort to Coercion or "Trial By Combat."

As was noted by this Court in *Hotel & Restaurant E. I. Alliance v. W.E.R.B.*, 315 U.S. 437, 439-40, Wisconsin has enacted "a comprehensive code governing the relations between employers and employees in the State." The statute underlying the present controversy is a part of this comprehensive labor code. (See Appendix.) This labor policy of Wisconsin was enacted in pursuance of the wise counsel of Mr. Justice BRANDEIS, dissenting in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 448 (quoted with approval in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 500):

" \* \* \* All rights are derived from the purpose of the society in which they exist; above rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. *This is the function of the legislature, which, while limiting the individual and group rights of aggression and defense, may substitute the processes of justice for the more primitive method of trial by combat.*" (Emphasis supplied)

For Wisconsin, too, declared it to be its public policy to substitute "processes of justice for the more primitive methods of trial by combat," while limiting "individual and group rights of aggression and defense." Sec. 111.01 (4), Wis. Stats. (1953), App. *infra*, p. 58.

Originally, Wisconsin had enacted, in 1937, the "Wisconsin Labor Relations Act,"<sup>56</sup> a statute patterned after the Federal Wagner Act which, in substance, regulated only employers prior to its amendment in 1947. Later, in 1939, this Act was replaced by the "Wisconsin Employment Peace Act"<sup>57</sup> which, as did the Labor-Management Relations Act of 1947<sup>58</sup> eight years later, made the regulation of labor relations a three-way street in that certain activities on the part of labor organizations were also declared to be unfair labor practices and public rights were proclaimed.

Above all, the present Wisconsin Act provides, in Sec. 111.04 (App. *infra*, p. 58), *inter alia*, that "employees shall have the right of self-organization and the right to form, join or assist labor organizations" and that such employees "*shall also have the right to refrain from any or all such activities.*"<sup>59</sup> The Act, further, provides for a representation and election procedure (Sec. 111.05), defines employer and employee unfair labor practices which are proscribed (Sec. 111.06), and sets forth a detailed and regular procedure for the prevention of unfair labor practices (Sec. 111.07), for arbitration (Sec. 111.10), and for mediation (Sec. 111.11). Sec. 111.15 (App. *infra*.

<sup>56</sup>Ch. 111, Wis. Stats. (1937), enacted by Ch. 51, Wis. Laws 1937.

<sup>57</sup>Ch. 111, Wis. Stats. (1953), enacted by Ch. 57, Wis. Laws 1939.

<sup>58</sup>29 U.S.C.A., Sec. 141 *et seq.*, enacted by Pub. L. No. 101, 80th Cong., 1st Sess.

<sup>59</sup>Compare Sec. 7, N.L.R.A., as amended, 29 U.S.C.A., Sec. 157.

pp. 58-60) specifically provides that the Act might not be so construed "as to invade unlawfully the right to freedom of speech."

In short, the Wisconsin labor relations law is as comprehensive as any which may have been enacted by the several states. Wisconsin has thus expressed its judgment on striking a balance between the competing interests existing in industrial relations. "Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect." *Teamsters Union v. Hanke*, 339 U.S. 470, 475. See also *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 500 n. 4; *Teamsters Union v. Hanke*, *supra*, at 478; *Building Service Employees v. Gazzam*, 339 U.S. 532, 537-8; *Hotel & Restaurant E. I. Union v. W.E.R.B.*, 315 U.S. 437, 442. Since Wisconsin has provided, by Sec. 111.04, that employees shall also have the right to refuse to join labor organizations and to refuse to be represented by them in collective bargaining, there is presented here a situation exactly as existed in *Building Service Employees Union v. Gazzam*, *supra*, where this Court said, at 538-9:

" \* \* \* Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of *employers of labor* in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint

of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment."

This comprehensive labor relations act, enacted, *inter alia*, in order to guarantee employees the right to self-organization, does not, of course, deprive unions of the right or opportunity to "organize" unorganized workers, i.e., peacefully to solicit employees to become members of these unions, or to seek their representation rights. By Sec. 111.05, Wis. Stats. (1953), part of this same Act, Wisconsin has created simple and workable machinery which permits labor unions to attain representative status through free elections and by orderly proceedings devoid of coercive influences, and nothing in that Act prevents unions from soliciting unaffiliated employees by peaceful, legitimate means, not involving coercion or intimidation, or any other violation of law. By creating such machinery for the attainment of representative status, Wisconsin has substituted "the processes of justice" for the "more primitive method of trial by combat," which method Petitioners here desire to utilize.<sup>60</sup>

In 1939 Wisconsin had taken under advisement the experiences had by its people with other, prior labor relations policies, and decided, as did Congress in 1947, that a change was in order. The result was the enactment of the Wisconsin Employment Peace Act.<sup>61</sup> That Wisconsin could properly determine such a change in legislative policy cannot be doubted, for, in *Teamsters Union v. Hanke*, 339 U.S. 470, 476-7, Mr. Justice FRANKFURTER made the following observation with respect to Wisconsin's labor relations policy (quoted with approval in

<sup>60</sup>See Benetar and Isaacs, "Pickets or Ballots?", 40 *A.B.A. J.* 848, 849 (1954).

<sup>61</sup>See Note 57, *supra*.

*Brown v. Sucher*, 258 Wis. 123, 127, 45 N.W. 2d 73, 75-6):

" \* \* \* In rejecting the claim that the restriction upon Senn's freedom was a denial of his liberty under the Fourteenth Amendment, this Court held that it lay in the domain of policy for Wisconsin to permit the picketing: 'Whether it was wise for the State to permit the unions to do so is a question of its public policy — not our concern.' 301 U.S. at 481.

"This conclusion was based on the Court's recognition that it was Wisconsin, not the Fourteenth Amendment, which put such picketing as a 'means of publicity on a par with advertisements in the press.' 301 U.S. at 479. If Wisconsin could permit such picketing as a matter of policy it must have been equally free as a matter of policy to choose not to permit it and therefore not to 'put this means' of publicity on a par with advertisements in the press.' If Wisconsin could have deemed it wise to withdraw from the union the permission which this Court found outside the ban of the Fourteenth Amendment, such action by Washington cannot be inside that ban."

Compare *Wood v. O'Grady*, 307 N.Y. 532, 122 N.E. 2d 386, 390.

The existence of such a comprehensive labor relations policy in Wisconsin, which not only establishes standards for fair employer and union conduct, but also sets up an orderly and logical machinery for unions to obtain representative status, decisively distinguishes the instant situation from that which existed, for example, in Illinois at the time of *A.F.L. v. Swing*, 312 U.S. 321, or in Alabama at the time of *Thornhill v. Alabama*, 310 U.S. 88. These states neither possess a comprehensive labor code, nor do they, to this day, provide machinery for the orderly attainment of representation rights by unions.

There, the respective states had not substituted "the processes of justice for the more primitive method of trial by combat," as did Wisconsin.

**C. The Right to Engage in a Lawful Business Free From Outside Interference is Also Constitutionally Protected.**

When the Wisconsin Supreme Court handed down its second opinion, upon rehearing, it recited the following principles, among others, which, in part, had motivated it to reverse its first decision, and to which it had previously given "too little consideration" (R. 30-31):

- A. Free speech is not the only right secured by the fundamental law.
- B. That it must be weighed against the equally important right to engage in a legitimate business.<sup>62</sup>
- C. That both the right to labor and the right to carry on business are liberty and property.<sup>63</sup>
- D. That the court had left out of calculation the rule that the court is to consider not only the established facts as they appear in the record, but that it should also give attention to the inference reasonably and justifiably to be drawn therefrom.<sup>64</sup>
- E. That in considering the right of freedom of speech, it must be recognized that the right is

<sup>62</sup>Cf., *Thomas v. Collins*, 323 U.S. 516, 538; *Carpenters & Joiners v. Ritter's Cafe*, 315 U.S. 722, 725.

<sup>63</sup>Cf., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465; *Truax v. Corrigan*, 257 U.S. 312, 327-8, 331 ff.; *Colgate v. Harvey*, 296 U.S. 404, 430; *Meyer v. Nebraska*, 262 U.S. 390, 399; *Dorchy v. Kansas*, 272 U.S. 306, 311.

<sup>64</sup>Cf., *Schenk v. U.S.*, 249 U.S. 47, 52; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 495-6.

to be evaluated with the right of the many who have no interest whatsoever in the relationships between the defendant unions and those whom they seek to acquire as members.<sup>65</sup>

F. That by its very nature, every right is related to a duty to exercise it so as to cause a minimum of harm to another, least of all to an innocent bystander.<sup>66</sup>

G. That the right of freedom of speech may not be considered apart from that of society to maintain order; that one who seeks freedom may not wholly ignore his neighbor's right to it.<sup>67</sup>

The Wisconsin Court thus recognized that the right to engage in a business enterprise, unfettered by unlawful interference, is as much protected by the Constitution as is the right to freedom of speech.

The right to engage in a business is indeed a valuable right of property and of liberty which finds protection in the Fifth and Fourteenth Amendments to the Constitution. *Truax v. Corrigan*, 257 U.S. 312, 327-8; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465; *Meyer v. Nebraska*, 262 U.S. 390, 399; *Colgate v. Harvey*, 296 U.S. 404, 430; *Pettibone v. U.S.*, 148 U.S. 197, 203. See also *Dorchy v. Kansas*, 272 U.S. 306, where Mr. Justice BRANDEIS stated, at 311:

"The right to carry on business — be it called liberty or property — has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted."

<sup>65</sup>Cf., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488.

<sup>66</sup>Cf., *Aikens v. Wisconsin*, 195 U.S. 194, 204-6.

<sup>67</sup>Cf., *Schenk v. U.S.*, 249 U.S. 47, 52.

Cf., *Goodwins v. Hagedorn*, 303 N.Y. 300, 305, 101 N.E. 2d 697, 699. And Respondent's right to carry on its business enjoys, moreover, the equal protection of the laws, as held in *Truax v. Corrigan*, 257 U.S. 312, 332-3:

"The guaranty [of equal protection of the laws] was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. *It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.*" (Emphasis supplied)

Rights are never absolute and independent of those of others. *Aikens v. Wisconsin*, 195 U.S. 194, 205-6. All rights must be exercised with due regard to the rights of others. The right of one person to do an act necessarily terminates at the point where it meets with another person's right that the act not be done. *Sic utere tuo ut alienum non laedas*. Cf., *Patterson v. Kentucky*, 97 U.S. 501, 505. These principles are hardly open to question, yet, their application would be completely frustrated if it were held that the picketing here could not be enjoined.

#### D. Changed Circumstances Require a Review of the Policy Considerations Governing the Balance of Competing Interests in Industrial Society.

Mr. Justice HOLMES pointed out many years ago that in tort law, as here,

" \* \* \* the ground of decision is policy; and the advantages to the community, on the one side and on the other, are the only matters really entitled to be weighed."<sup>68</sup>

<sup>68</sup>Holmes, "Privilege, Malice, and Intent," 8 *Harr. L. Rev.* 1, 9 (1894)

This truism is exemplified by the changing tenor of the decisions of this Court in picketing-free speech cases, where it was always noted that the particular expressions contained therein were restricted "to their specific context." *Teamsters Union v. Hanke*, 339 U.S. at 480 n. 6. Stripping the problem here to its very essence, this Court again is confronted with the task of making policy as to the allowable area of economic conflict between competing interests in industrial society, in the light of present-day conditions.

We have seen that organized labor, in recent years, has experienced a tremendous growth in economic power and importance. Paralleling this development, the State of Wisconsin enacted a comprehensive labor relations law in accordance with its social and economic policies developed in the light of the prevailing social and economic factors.<sup>69</sup> That legislative policy imposed certain inhibitions upon the conduct of employers, labor unions and employees and, above all, guaranteed employees the right to self-organization and to join unions, including the right to refrain from so doing.

Recognizing existing conditions, and abiding by this State legislative policy, the Wisconsin Supreme Court, in its second opinion upon rehearing, relied, in part, upon certain fundamental considerations (R. 30, 31) which were summarized above. (*Supra*, p. 49). These propositions emphasize that the employer, too, has certain rights of liberty and property protected by the Constitution, a view which is entirely consistent with the pronouncement of this Court that "espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." *Giboney*

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<sup>69</sup>See *Teamsters Union v. Hanke*, 339 U.S. at 474-5.

*v. Empire Storage & Ice Co.*, 336 U.S. 490, 495-6; *Thomas v. Collins*, 323 U.S. 516, 538; *Carpenters & Joiners v. Ritter's Cafe*, 315 U.S. 722, 725; cf., *Truax v. Corrigan*, 257 U.S. 312, 331 ff. Indeed, other types of actionable conduct, also containing elements of communication, have never been accorded the protection of the First and Fourteenth Amendments.<sup>70</sup>

We have here a perfect example of the interplay of competing social and economic interests and viewpoints. On the one hand, there are petitioner labor unions led by the most powerful of all, the International Brotherhood of Teamsters, seeking to accomplish, by coercive pressure upon the employer that which they were unable to attain by peaceful persuasion through solicitation of the employees, viz, representation rights and additional membership. On the other side there is Respondent, a gravel pit and ready-mixed concrete operator whose business is so small that it does not meet the jurisdictional standards of the National Labor Relations Board, and does not, in fact, affect interstate commerce (R. 4, 6, 16,

<sup>70</sup>Charles O. Gregory in "Picketing and Coercion: A Defense," 39 *I. a. L. Rev.* 1053, 1056-7 (1953) notes in this regard:

"The only reason [peaceful picketing] is at all confused with constitutionally guaranteed free speech is that it contains an element of communication. \* \* \* But the same may be said of libel and slander or invasions of the right of privacy, as well as of fraud, and blackmail. \* \* \* And surely communications to restrain trade is in the same category. \* \* \* Yet all these verbal manifestations may be outlawed or regulated. The elements which justify treating these communications as unlawful are what the communications *do achieve*. That I am probably correct in this feeling about peaceful picketing wins support from the way the Supreme Court has backed down on the *Thornhill* doctrine until there is precious little left of it. \* \* \*

17).<sup>71</sup> Such an employer requires, and is entitled to, the protection of the law against the intentional infliction of economic harm, which has no justification either in policy or as a means of levelling the alleged imbalance of power and influence between labor organizations on the one hand, and employers on the other. If this Court has, in the past, established a "constitutional boundary line between the competing interests" of industrial society<sup>72</sup> in the light of their relative power and influence at that time, such "boundary line" should be reexamined in the light of present-day facts and circumstances.

A realistic re-appraisal of the status and relative power of the actors involved in a labor controversy is necessary. Labor unions, like everyone else, must let live as well as live; yet, the substantial economic power of Petitioners was here used to compel Respondent to abide by union policy rather than State policy. Cf., *Building Service Employees v. Gazzam*, 339 U.S. 532, 540. It is submitted that this Court cannot tolerate that so reasonable a State policy should be frustrated in such manner.

#### **E. Petitioners Ignore Reality in Asserting that the Picketing Here Was Protected as Free Speech.**

No collection of epithets and metaphors culled from opinions of this Court (regardless of their relevance), as found in Petitioners' brief, can detract from the fact

<sup>71</sup>Because of the principle of Federal preemption, the issue now before this Court, and the Wisconsin statute in question, would not be applicable to like activities affecting a business coming under the jurisdiction of the National Labor Relations Board. Cf., *Garner v. Teamsters Union*, 346 U.S. 485; R. 41. Thus, the decision of the Court herein will have a particular impact upon the ordinarily small business enterprises encompassed by intra-state commerce.

<sup>72</sup>Cf., *Hughes v. Superior Court*, 339 U.S. 464-6; *Teamsters Union v. Hanke*, 339 U.S. 470, 475; *Thornhill v. Alabama*, 310 U.S. 88, 104.

that the decision here under review must be tested in the light of all of the facts, circumstances and limitations which were considered by the Court below. (R. 35-36).

"However general or loose the language of opinions, the specific situations have controlled the decision." *Hughes v. Superior Court*, 339 U.S. 460; 465. To the same effect, *Teamsters Union v. Hanke*, 339 U.S. 470, 480:

"When an injunction of a State court comes before us it comes not as an independent collocation of words. It is defined and confined by the opinion of the State court. The injunctions \* \* \* are to be judged here with all the limitations that are infused into their terms by the opinions of the Washington Supreme Court on the basis of which the judgments below come before us."

When a stranger union pickets, as here, after having unsuccessfully solicited workers for union membership, it inflicts, or seeks to inflict, economic harm which cannot find justification under the labor policy of Wisconsin, as embodied in the Employment Peace Act, Ch. 111, Wis. Stats. (1953). Such a union, in effect, aims to secure bargaining rights without true representative status, which lies at the bottom of Wisconsin (and Federal) labor relations policy. Petitioners thus seek to impose themselves upon Respondent's employees, as their bargaining representative, whether or not they so desire. The choice then no longer rests with the *employees*, as the law prescribes, but with the stranger union and the employer. In view of such a deliberate disregard of State labor policy, there cannot possibly be any justification for the economic harm imposed upon the employer by picketing under a claim of "free speech."

There is not present here, really, a constitutional issue of substance, for it cannot be conceived that the Four-

teenth Amendment would protect, under the guise of free speech, acts of economic coercion which have as their objective the defeat of the commendable labor policy inherent in both the Wisconsin and the Federal labor laws: That employees shall have the right to self-organization, to join or associate with labor organizations, to engage in concerted activities for bargaining and mutual protection, and that they shall also have the *right to refrain* from any or all such activities.

### CONCLUSION

We submit that Petitioners' conduct here was much more than merely communication of information or peaceful persuasion. It constituted actionable "coercion or conduct otherwise unlawful or oppressive," which does not enjoy the protection of the Constitution. *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 775; *Thomas v. Collins*, 323 U.S. 516, 538-9. Under the circumstances, their conduct was no different than if they had made upon the employer, audibly; a present demand for recognition. *Building Service Employees Union v. Gazzam*, 339 U.S. 532, clearly controls the decision.

We therefore respectfully request that this Court affirm the judgment of the Wisconsin Supreme Court.

*Respectfully submitted,*

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## APPENDIX

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The relevant provisions of Chapter 111 of the Wisconsin Statutes (1953) are as follows:

"111.01 **Declaration of policy.** The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this subchapter is enacted, is declared to be as follows:

"(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

"(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer co-operatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

"(3) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employee. For the purpose of such negotiation an employee has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

"(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employee, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights or aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

\* \* \*

"111.04. **Rights of employees.** Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

\* \* \*

"111.06 **What are unfair labor practices.** (1) It shall be an unfair labor practice for an employer individually or in concert with others:

"(a). To interfere with, restrain or coerce his employees in the exercise of the rights guaranteed in section 111.04.

"(b) To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it,

\* \* \*

\* \* \*

"(c) To encourage or discourage membership in any labor organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; \* \* \*

\* \* \*

"(e) To bargain collectively with the representatives of less than a majority of his employees in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1)(c) of this section."

\* \* \*

"(2) It shall be an unfair labor practice for an employe individually or in concert with others:

"(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"(b) To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative."

\* \* \*

#### "111.07 Prevention of unfair labor practices.

(1) Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this subchapter, *but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.*"

\* \* \*

"111.15 - Construction of subchapter I. Except as specifically provided in this subchapter, nothing therein shall be construed so as to interfere with or

impede or diminish in any way the right to strike or the right of individuals to work; *nor shall anything in this subchapter be so construed as to invade unlawfully the right to freedom of speech.*

\* \* \*

\* \* \*

(Emphasis supplied)

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Supreme Court of the United States

Case No. 100-100000

INTERNAL SECURITY - FEDERAL GOVERNMENT

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1956

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NO. 79

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
LOCAL 695, AFL, et al.,

vs.

VOGT, INC.

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF WISCONSIN

---

BRIEF FOR THE AMERICAN FEDERATION OF  
LABOR AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS AS AMICUS CURIAE

---

Interest of the AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

It is submitted by the AFL-CIO because the principle that peaceful picketing in support of union organizing is a part of the "freedom of speech" guaranteed by the First and Fourteenth Amendments is of vital importance to workers and unions; and because in many States that principle is either being denied outright or eroded away by decisions like that of the court below in the present case.

Decisions of the latter sort, while paying lip service to the doctrine that peaceful picketing for lawful objectives is constitutionally protected free speech, are in practice barring all organizational picketing. In each such case the courts infer, from the circumstances of the picketing, some "purpose" or "objective" violative of state law or policy. Usually, the unlawful purpose or objective attributed by the Court to the union is to coerce the employer to coerce the employees to join the union. Usually the court "infers" this unlawful purpose from some particular circumstance of the picketing, such as that the union solicited the employees to join before initiating picketing, or that it failed to solicit them, as the case may be. Whatever the circumstances, the necessary inference of an illegal purpose is drawn and the picketing is enjoined.

We do not believe that this Court has intended to nullify its decisions according constitutional protection to peaceful organizational picketing. But the courts of many States are doing just that. We of course realize that the Court will decide only the case or cases before it; but we urge that it view the issues those cases present realistically in the context of what the state courts are doing generally.

In this brief we shall seek to demonstrate, first, that this Court has not overruled the principle that free speech encompasses organizational picketing; and, second, that the courts of many States have overruled that principle, sometimes even in theory and more often in practice. Finally, we shall suggest certain steps which we think

this court might appropriately take to safeguard this important right from state court subversion.

## ARGUMENT

### I

#### Freedom of Speech Includes Peaceful Picketing in Support of Union Organizing

##### A. The General Doctrine that Picketing is a Form of Speech.

As this Court said in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293, 61 S. Ct. 552, 555, "Peaceful picketing is the workingman's means of communication." It is the natural way for workers to publicize the facts of a labor dispute. Picketing does not require heavy financial outlay, usually only a sign or placard or banner, and the pickets' contribution of their own time. It is the means by which workers can most easily reach those who may be in a position to give them support: the employers, the employees, and the customers of the enterprise involved. In the language of Justice Douglas, dissenting, in *Local Union No. 10 v. Graham*, 345 U.S. 192, 202, 73 S. Ct. 585, 590, 591:

"Picketing is a form of free speech—the workingman's method of giving publicity to the facts of industrial life."

The doctrine that the right to engage in peaceful picketing is protected by the constitutional guarantees of free speech and due process is thus of vital importance to workers and their unions.

The doctrine, however, is not of ancient origin. Like the even more basic right of workers to form unions,<sup>1</sup> it

<sup>1</sup> *NLRB v. Jones & Laughlin S. Corp.*, 301 U.S. 1, 57 S. Ct. 615; *Thomas v. Collins*, 323 F.S. 516, 65 S. Ct. 315.

received recognition as constitutionally protected only within the last few decades, as a consequence of growing appreciation of the realities of industrial life. The earliest enunciation of the principle that peaceful picketing is a form of communication within the guarantees of free speech seems to be Justice Brandeis' well known dictum in *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468, 478, 57 S. Ct. 857, 862; and the leading cases are, of course, *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, and *Carlson v. California*, 310 U.S. 106, 60 S. Ct. 746, decided the same day.

In the *Thornhill* case, the Court held invalid on its face an Alabama statute prohibiting picketing generally. The Court held that freedom of speech includes peaceful picketing; and it noted that (310 U.S. 88, 104, 60 S. Ct. 736, 745):

"The range of activities proscribed by [the Alabama statute] . . . whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute."

The Court ruled that picketing may not be prohibited simply because it may lead to action injurious to the picketed establishment. It said (310 U.S. 88, 104, 60 S. Ct. 736, 745):

"Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."

The Court summarily rejected the argument that a State

may ban all picketing because of the inherent likelihood that it will give rise to breaches of the peace.<sup>2</sup>

The various interests which the State sought to protect by its ban on picketing must, the Court said, be weighed (310 U.S. at 105, 60 S. Ct. at 746)—

“against the interest of the community and that of the individual in freedom of discussion on matters of public concern.”

Finally, the Court quoted with approval (310 U.S. at 105-106, 60 S. Ct. at 746) the statement in *Schneider v. State*, 308 U.S. 147, 161, 60 S. Ct. 146, 150, that—

“[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”

The companion case decision in *Carlson v. California* is particularly interesting in connection with the present case because the anti-picketing ordinance there held invalid was sought to be sustained on what has come to be known as the unlawful purpose doctrine. The Court said (310 U.S. at 112, 60 S. Ct. at 749):

“It is true that the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in publicizing the facts of a labor dispute; every employee or member of a union who engaged in such activity in the vicinity of a place of business could be found desirous of accomplishing such objectives: \* \* \*

<sup>2</sup> Similarly, the Court has repeatedly turned down the argument that leaflet distribution may be banned because it leads to littering of the streets. And cf. *Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894.

## B. Application of the Principle to Organizational Picketing.

The opinion in the *Thornhill* case states that the pickets were employees of the company picketed and that they were members of a union which represented most of the employees and was on strike. Those facts do not, however, appear to have been regarded as important to the result in the case; and in *AFL v. Swing*, 312 U.S. 321, 61 S. Ct. 568, the Court made it clear that the Constitution's protection of peaceful picketing is not restricted to disputes between an employer and his own employees. In that case (312 U.S. at 323, 61 S. Ct. at 569):

"A union of those engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed."

The Illinois courts enjoined the picketing. They held that picketing is unlawful (312 U.S. at 324, 61 S. Ct. at 569):

"when conducted by strangers to the employer (i.e., where there is not a proximate relation of employees and employer), \* \* \*."

This Court reversed. It said (312 U.S. at 326, 61 S. Ct. at 570):

"A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Foundries v. Tri-City Council*, 257 U.S. 184, 209, 42 S. Ct. 72, 78. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

The right to engage in stranger picketing was again held to be constitutionally protected in *Bakery and Pastry Drivers, Etc. v. Wohl*, 315 U.S. 769, 62 S. Ct. 816. There the state ban on picketing was sought to be supported on the ground that no "labor dispute" was involved within the meaning of the New York statutes.<sup>3</sup> This Court reversed. It declared (315 U.S. at 774, 62 S. Ct. at 818):

"one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

Accord: *Cafeteria Employees Union, Etc. v. Angelos*, 320 U.S. 293, 64 S. Ct. 126.

#### C. The Unlawful Purpose Doctrine in This Court.

In holding that picketing is constitutionally protected as free speech, this Court made it clear from the outset that it is only peaceful picketing that is so protected. See

<sup>3</sup> Similar Wisconsin statutes (R. 23-24) barring all stranger picketing were applied by the trial judge in the present case. He said (R. 2):

"The free speech issue as applied to picketing and the rule thereon as stated in the *Thornhill* case has lost most of its effectiveness by modification thereof in many more recent cases. It probably can be said that it is no longer the law."

However, the state Supreme Court in its first opinion declared that these Wisconsin statutes were invalid under the *Swing* and *Wahl* cases (R. 27); and even on rehearing the court declined to hold (R. 41)—

"that the state may forbid peaceful picketing solely because there is no immediate employer-employee dispute as was held in the *Swing* case."

*Carlson v. California*, 310 U.S. 106, 113, 60 S. Ct. 746, 749. And the Court accordingly held that picketing loses its constitutional sanction if "set in a background of violence." *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287, 294, 61 S. Ct. 552, 555. The Court also held, by a 5-4 vote, that a State may constitutionally bar picketing at an establishment physically remote and a different industry from that sought to be organized, though under common ownership. *Carpenters and Joiners Union v. Ritter's Cafe*, 315 U.S. 722, 62 S. Ct. 807.

More recently, in a series of cases the Court has developed the doctrine that picketing which seeks the attainment of an unlawful objective may constitutionally be prohibited. Since the way this doctrine has been applied is at issue in the present case, and since its application by other state courts, in our view, threatens the complete destruction of all constitutional protection for peaceful organizational picketing, we will examine these cases in some detail.

The first of these cases is *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S. Ct. 684. In that case a unanimous Court, speaking through Mr. Justice Black, held that a Missouri court could constitutionally enjoin union ice peddlers from picketing an ice company in support of a demand that the company enter into an agreement with the union not to sell ice to non-union peddlers. The execution of such an agreement would have violated the Missouri anti-trust statute, and the Court held that since the picketing sought to induce illegal conduct, it could be enjoined.

It is quite clear that this decision was not intended to limit the general reach of the *Thornhill* or *Swing* cases. That the union had explicitly demanded that the employer enter into an illegal contract was admitted. Indeed, all of the other ice distributors in the city had been induced by the union to enter into such agreements. Further, the Court noted (336 U.S. at 502, 69 S. Ct. at 691):

“The interest of Missouri in enforcement of its anti-trust laws cannot be classified as an effort to outlaw only a slight public inconvenience or annoyance.”

The union's claim amounted to an assertion that it was entitled to induce a violation of the anti-trust laws so long as it did so through the medium of speech, i. e., picketing, and the Court rejected that claim.

We come then to *Hughes v. Superior Court*, 339 U.S. 460, 70 S. Ct. 718, and its companion cases. There, a Negro welfare association (not a union) demanded that a grocery store in hiring new employees select qualified Negroes until the percentage of employees was equal to the percentage of Negro trade. When the store owner refused, members of the organization picketed the store carrying placards truthfully stating the facts. The white employees continued to work, but some Negro customers were presumably persuaded to take their trade elsewhere. The California courts enjoined the picketing and this Court, in an opinion by Mr. Justice Frankfurter, affirmed.

In the view of this Court, the Supreme Court of California had (339 U.S. at 462, 70 S. Ct. at 720)—

“held that the conceded purpose of the picketing in this case—to compel the hiring of Negroes in proportion to Negro customers—was unlawful even though pursued in a peaceful manner.”

The Court said that States may believe that to permit picketing in support of proportionate hiring “would inevitably encourage use of picketing to compel employment on the basis of racial discrimination” and that “community tensions and conflicts would be exacerbated” (339 U.S. at 464; 70 S. Ct. at 721).

The Court said that it was “immaterial” that California's policy was judicially declared rather than enunciated by the legislature. Though the Court referred to *Thornhill*

and *Swing* with no intimation that it was limiting them, it also spoke of "the compulsive features inherent in picketing beyond the aspect of mere communication as an appeal to reason" (339 U.S. at 468, 70 S. Ct. at 723). The Court concluded (339 U.S. at 469, 70 S. Ct. at 723):

"The injunction here was drawn to meet what California deemed the evil of picketing to bring about proportional hiring. We do not go beyond the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts."

Three justices concurred specially, and Justice Douglas did not participate.

On the same day as the *Hughes* case, the Supreme Court also decided *Teamsters Union v. Hanke*, 339 U.S. 470; 70 S. Ct. 773, and *Building Service Employees Union v. Gazzam*, 339 U.S. 532, 70 S. Ct. 784.

In the *Hanke* case, members of the union picketed two used car businesses in Seattle, conducted in each case by the owners themselves without employees. The purpose of the picketing was to induce the owners to comply, as respects night and holiday closing, with an agreement between the union and the local automobile dealers association. The trial court enjoined the picketing, and the Supreme Court of Washington affirmed. It asserted that the union's interests in the working conditions of a small number of members was far outweighed by the interests of the individual proprietors and the people of the community as a whole, "to the end that little businessmen and property owners shall be free from dictation as to business policy by an outside group having but a relatively small and indirect interest in such policy." (339 U.S. at 477-478, 70 S. Ct. at 777).

This Court affirmed.

Justice Frankfurter, in an opinion concurred in by three other justices, enunciated substantially the same views ex-

pressed in the *Hughes* case. He said that the Court could not conclude that the State, in barring picketing for the purpose of unionizing self-employers (339 U.S. at 479, 70 S. Ct. at 778)—

“has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice.”

And he repeated the statement in the *Hughes* case that it was immaterial that the state policy was a judicially determined one.

As respects the *Swing*, *Wohl* and *Angelos* cases, Justice Frankfurter said (339 U.S. at 479-480, 70 S. Ct. at 778):

“In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances to what constitutes an industrial relationship or a labor dispute.”

Justice Clark concurred in the result.

Justices Minton and Reed dissented on the ground that the picketing was neither in a context of violence, as in the *Meadowmoor* case, or for the purpose of inducing the person picketed to violate state law, as in the *Giboney* case. Therefore, they said, under the Thornhill line of decisions the picketing was protected by the Constitution. Justice Black likewise dissented, while Justice Douglas did not participate.

In the *Gazzam* case, the union sought to induce the employees of a hotel in the State of Washington to join the union and asked the employer to sign a union shop contract. Most, or all, of the employees declined to join the union, and the union thereupon commenced picketing. The pickets carried a sign reading: “Enetai Inn—Unfair to Organized Labor.”

A Washington statute declared that employees should

be free from "interference, restraint, or coercion of employers in the" designation of a bargaining representative, and a state court enjoined the union (339 U.S. at 533, 70 S. Ct. at 785):

"from endeavoring to compel plaintiff to coerce his employees to join the defendant union or to designate defendant union as their representative for collective bargaining, by picketing the hotel premises of plaintiff . . . ."

This Court unanimously affirmed. It took the view that since the picketing was in support of an unlawful objective the case was controlled by *Giboney* rather than by *Swing*.

Finally, we come to *Local Union No. 10 v. Graham*, 345 U.S. 192, 73 S. Ct. 585. In that case various building trades unions took exception to the fact that a construction job was not 100 percent union, and there was testimony that they urged the principal contractor to cancel the contract of a subcontractor who was using non-union men. When the dispute was not resolved the unions commenced picketing, the pickets carrying a sign reading: "This Is Not A Union Job. Richmond Trades Council." The state trial court made no findings of fact, but recited in its decree enjoining the picketing that it was carried on for purposes and objectives illegal under the Virginia "right-to-work" law. The state supreme court affirmed without opinion.

This Court likewise affirmed. It said (345 U.S. at 197, 73 S. Ct. at 588):

"In a case of this kind, we are justified in searching the record to determine whether the crucial finding by the state courts had a reasonable basis in the evidence."

Examining the record, the Court ruled that there was reasonable basis in the evidence for concluding that the picketing sought the discharge of non-union workmen.

Justice Douglas dissented. He said (345 U.S. at 204, 73 S. Ct. at 591):

"If Virginia is to enjoin this form of free speech, I would require her to show precisely the reasons for it. Unless we are meticulous in that regard, great rights will be lost by the absence of findings, by the generality of findings, or by the vagueness of decrees."

Justice Black also dissented.

These opinions, beginning with *Hughes* and ending with *Graham* have, as we will show in Part II of this brief, led many state courts to the conclusion that organizational picketing no longer has constitutional protection, or not much. In Part III we will examine the factors in these opinions which have led, or enabled, the state courts to reach this result despite the fact that this Court did not in any of these decisions purport to overrule *Swing* or *Wohl*.

## II

### The Courts of Many States Are Denying All Constitutional Protection to Organizational Picketing

We have stated that the courts of many States are now, either in theory or in actual practice, denying all constitutional protection to organizational picketing. That this is so we will now endeavor to demonstrate. Our examination of state cases is meant to be illustrative rather than exhaustive; and it omits entirely those cases in which the purported justification for barring picketing is the *Meadowmoor* context of violence doctrine.

The state court decisions enjoining organizational picketing fall into two broad categories.

First, in a few States all organizational picketing is barred as a matter of law, either by judicial decision or under state statutes. Some courts in reaching or support-

ing this result have declared that organizational picketing is inherently coercive of the employees. Logically, such a doctrine might permit the barring of all picketing, including picketing for recognition by a union representing a majority of the employees, and even picketing during strikes over economic issues, but as far as we have discovered no court or legislature has yet gone that far.<sup>4</sup>

Secondly, and more usually, resort is had to the illegal purpose doctrine. This doctrine subdivides, in turn, into the issues of (1) what purposes are illegal, and (2) what, if any, proof of an illegal purpose is required.

#### A. The Doctrine That Organizational Picketing is Illegal as a Matter of Law.

The operation of this doctrine in the state courts is illustrated by *Pappas v. Stacey*, 151 Me. 36, 116 A. 2d 497, 36 LRRM 2619 (1955), appeal dismissed 350 U.S. 870, 76 S. Ct. 117. In that case, according to the agreed statement of facts, a union and three employees of a restaurant who had joined the union and were on strike, picketed the restaurant, "for the sole purpose of seeking to organize other employees."

The Maine Supreme Judicial Court held, first, that the strike of the three employees and the accompanying picketing were illegal because for the purpose of coercing the employer to join the union.<sup>5</sup>

<sup>4</sup> The Louisiana Supreme Court has, however, barred picketing of sugar mills during the harvesting season, as a threat to the economy of the State: *Godchaux Sugars, Inc. v. Chaisson*, 227 La. 146, 78 So. 2d 673, 35 LRRM 2515 (1955).

<sup>5</sup> A Maine statute provides that workers shall have freedom to designate representatives of their own choosing for collective bargaining "free from interference, restraint, or coercion by their employers or other persons."

Many states have statutes of this general purport; and even in their absence the state courts usually hold that it is against public policy for an employer to make his employees join a union, except, in some states, pursuant to a valid union shop agreement.

The court held, secondly, and more broadly, that (36 LRRM 2621) "peaceful picketing for organizational purposes is unlawful under our law, and may be enjoined." The court declared that: "A coercive force is generated by the picketing to secure new members for the union." This coercion, the court said, operates not only through the employer (its first ground of decision), but directly upon the employees (36 LRRM 2621):

"Irreparable damage to employer must in any appreciable period be like damage to the employee. The defendants say in substance to the twenty-seven non-union workers 'join with us or we will continue to harm the business in which you are employed.'

"The picketing is at least an act of interference with the employee in the exercise of his personal rights."

The Wisconsin statutes, which the court below first held unconstitutional (R. 22-27), and on rehearing passed over in favor of the unlawful purpose doctrine (R. 41),<sup>6</sup> prohibit

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<sup>6</sup> The opinion of the Wisconsin Supreme Court in the present case, on rehearing, discusses *Pappas v. Stacey* at some length, and states (R. 40):

"It is worthy of note that an appeal was taken to the United States Supreme Court. There is no record of the Federal Court's action except an entry in its journal, as follows:

"The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas would note probable jurisdiction."

"It would appear from this entry that the court dismissed the appeal because no federal question was presented, suggesting that the court did not consider itself bound by the rule of the *Swing* case which, when this case was first studied by us, we considered as requiring reversal."

The court below nevertheless declined to uphold the state's statutory ban on stranger picketing, and chose instead to rest its decision on the unlawful purpose doctrine.

picketing except during a controversy between an employer and the majority of his employees (R. 23-24). Similar statutes have recently been held invalid by the courts of Oregon and Arizona: *Gilbertson v. Culinary Alliance*, 204 Ore. 326, 282 P. 2d 632, 36 LRRM 2001 (1955); *Shamrock v. Teamsters Local*, 36 LRRM 2748 (Ariz. Superior Ct., 1955). Earlier, the Supreme Court of Texas reached the same conclusion in *Operating Engineers v. Cox*, 148 Tex. 142, 219 S.W. 2d 787, 23 LRRM 2527 (1949).

In the *Gilbertson* case, however, the Oregon court upheld a state statute prohibiting "picketing for the purpose of compelling, intimidating, coercing or influencing an employee or any employer to join a labor organization." It distinguished *Swing* by quoting this Court's subsequent statement in *Gazzam*, that in *Swing* "this Court struck down the state's restraint of picketing solely upon the absence of an employer-employee relationship." Thus the Oregon court viewed *Swing* and *Wohl* as protecting minority picketing but not stranger picketing, although factually both *Swing* and *Wohl* involved the latter rather than the former.

In Ohio, organizational picketing seems to be banned outright by judicial decision. In each case the Ohio courts recite that the picketing is intended to coerce the employer to coerce his employees to join the union; but they appear to regard this proposition as an irrebutable conclusion of law rather than a question of fact.<sup>7</sup>

<sup>7</sup> See *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 27 LRRM 2669 (Ohio Ct. App.), 164 O.S. 285, 130 N.E. 2d 237, pending on writ of certiorari, No. 41, this Term; *Anderson v. Retail Clerks Union*, 38 LRRM 2324, 2326 (Ohio Ct. App. 1956); *Richman Bros. v. Clothing Workers*, 132 N.E. 2d 769, 39 LRRM 2133 (Ohio Common Pleas 1956); *Chucates v. Royalty*, 164 O.S. 214, 129 N.E. 2d 823, 37 LRRM 2038 (1955).

## B. The Unlawful Purpose Doctrine.

The decision below in the present case is itself a very good illustration of the current operation of the unlawful purpose doctrine in the state courts. The trial court found that "the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's [sic]" (R. 1, R. 16). It refused to find, as requested by the plaintiff, that the picketing was for the purpose of coercing the employer to coerce its employees to become members of the unions (R. 35). (However, the trial court enjoined the picketing under the Wisconsin statutes banning all stranger picketing.)

The state supreme court, on rehearing, reversed, on the ground that just this finding should have been made. The process by which the supreme court reaches this conclusion is as follows: the court notes, first, that the picketing was conducted (R. 35) "upon a rural highway at the entrance to a gravel pit where an exceedingly small number of possible or probable patrons of the owner's business might pass and be influenced by the Union's [sic] banner, \* \* \*." Obviously, therefore, the Court said (R. 36) "the message carried by the pickets could not have been intended for the guidance of the community."<sup>8</sup>

The court likewise decided (R. 36) that the message carried upon the unions' banner could not have been intended for the enlightenment of the employees because they had already been asked to join the unions and had refused.

Having disposed of these two possibilities, the court said that (R. 36) "it is clear to us" that the only purpose of the picketing was to influence truck drivers to refuse to make

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<sup>8</sup> Had the picketing been conducted anywhere other than at the entrance to the gravel pit, the court below presumably could have enjoined it on authority of the *Ritter's Cafe* case.

deliveries in the hope of coercing the employer to coerce its employees to join the unions.

The dissenting judge likewise seemed to think that the validity of the picketing should be determined according to the court's guess as to its purpose. He likewise drew (R. 43) "a reasonable inference" that since the picketing was rural it was not aimed at the general public. However, of what he conceived to be "the two remaining conceivable objectives" (i.e., an attempt to induce the employees to join the unions, or to coerce the employer to coerce the employees), he felt that the former was the more likely.

We do not believe that detailed descriptions of the innumerable other state court cases enjoining organizational picketing would be helpful. Instead, we will enumerate some of the factual circumstances which have been recited by the courts in organizational picketing cases as supporting the inference drawn by the court that the purpose of the picketing was to coerce the employer to coerce the employees to join the union. Except as otherwise noted, all of the cases below are organizational picketing cases, in which no demand of any sort had been made on the employer by the union.

*Circumstances from which courts have inferred that picketing seeks to coerce the employees to join the union:*

1. That the pickets are strangers.

As shown, *supra* pp. 14-16, the courts of various States, such as Maine and Ohio, view stranger picketing as coercive and illegal *per se*. See also *Spokane Building and Construction Trades Council v. Audubon Homes, Inc.*, 149 Wash. 144, 298 P. 2d 1112, pending on petition for certiorari, No. —, this Term.

2. That the pickets are *not* strangers, but employees.

*Pappas v. Stacey*, 151 Me. 36, 116 A. 2d 497, 36 LRRM 2619 (1955), appeal dismissed 350 U.S. 870, 76 S. Ct. 117.

3. That the picketing takes place at the site of the enterprise sought to be organized.

This was regarded as a telling circumstance by the Supreme Court of Wisconsin in the present case; and also by the Missouri Supreme Court in *Bellerive Country Club v. McVey*, 284 S.W. 2d 492, 36 LRRM 2282 (1955). In the latter case, the picketing took place at the entrance to a country club sought to be organized, and the fact that it was in a rural area was regarded by the Missouri court as a circumstance pointing to an intention to coerce the employer rather than to appeal to the general public.

4. That the picketing does *not* take place at the site of the enterprise sought to be organized.

In *Ritter's Cafe*, supra p. 8, this circumstance was regarded as supporting the constitutionality of the ban on picketing by the Texas state courts, and picketing other than at the site is very generally frowned on. For example, the Supreme Court of Arkansas bans picketing away from the site of the enterprise both for organizing purposes (*IBEW v. Broadmoor Builders, Inc.*, 280 S.W. 2d 898, 36 LRRM 2499) and during a strike over economic issues (*Teamsters Union v. Blessingame*, 293 S.W. 2d 444, 38 LRRM 2351, pending on petition for certiorari, No. 546, this Term).

5. That the employees were solicited by the union prior to the picketing.

This circumstance was regarded as supporting the inference that the union's purpose was to coerce, both by the court below in the present case and by the Washington Supreme Court in *Spokane Building and Construction Trades Council v. Audubon Homes, Inc.*, supra p. 20.

6. That the employees were *not* solicited by the union prior to the picketing.

This circumstance was regarded as invidious in: *Bellerive Country Club v. McVey*, supra p. 20; *Baderak v. Building Trades Council*, 112 A. 2d 170, 35 LRBM 2623, (Pa. Sup. Ct. 1955); *Teamsters Union v. Merchandise Co.*, 37 LRRM 2819 (Ind. App. 1956). (In the last case the court employs "no labor dispute" rather than "unlawful purpose" terminology.)

7. That the enterprise is *not* a commercial one:

*Bellerive Country Club v. McVey*, supra.

8. That the enterprise is a commercial one.

While this is not often explicitly stressed, it seems to be implicit in many of the cases that the fact that the employer is engaged in a commercial enterprise and will suffer financial loss and competitive disadvantage from the picketing is a circumstance pointing to a purpose to coerce the employer. See, e.g., *Pappas v. Stacey*; *Spokane Building and Construction Trades Council v. Audubon Homes, Inc.*

Some courts hold that if organizational picketing goes on for an unreasonable length of time, it may be inferred that it has an improper purpose. *Anchorage, Inc. v. Waiters Union*, 283 Pa. 547, 119 A. 2d 199, 37 LRRM 2288 (1956); *Hammer v. Textile Workers*, 111 A. 2d 308, 34 LRRM 2812 (N.J. S. Ct. 1954). Contra: *Wood v. O'Grady*, 307 N.Y. 522, 122 N.E. 2d 386, 35 LRRM 2028 (1954).

While a design to coerce the employer to coerce his employees to join the union is the unlawful purpose most usually inferred for banning organizational picketing, in some cases the courts have, instead or in addition or alternatively, inferred an unlawful purpose to destroy the plain-

tiff's business.<sup>9</sup> *Hammer v. Textile Workers*, supra; *Spokane Building and Construction Trades Council v. Audubon Homes, Inc.*, supra. In the latter case, the Court said:

"It is not clear, from the record, whether the ultimate purpose of the picketing was to coerce plaintiff into having its employees join a union, or, since defendants had not even approached plaintiff, to cut off plaintiff's building materials and thus force plaintiff's business to die on the vine. In either event, the picketing was coercive and unlawful."

We do not want to leave the impression that all of the courts in all of the States always ban organizational picketing by inferring a union purpose to coerce the employer to coerce his employees to join the union, or some other unlawful purpose. While that is what happens in some States, in others, such as New York, the courts sometimes, or even usually, refuse to infer an unlawful purpose from the bare fact of organizational picketing.<sup>10</sup> The state of

<sup>9</sup> Conversely, it has been held unlawful for a union to strike for the purpose of compelling the employer to remain in business at a particular location. *Anheuser-Busch, Inc. v. Brewery Workers*, 286 N.Y. S. Ct. 832, 35 LRRM 2740 (1955).

<sup>10</sup> Refusal to draw inference that union's object is to coerce employer to compel employees to join the union: *Wood v. O'Grady*, 307 N.Y. 522, 122 N.E. 2d 386, 35 LRRM 2028 (1954); *Grubman v. Harlem Labor Union*, 36 LRRM 2245 (N.Y. S. Ct. 1955); *Ringling Bros. v. Lewis*, 152 N.Y. S. 2d 835, 37 LRRM 2810 (N.Y. S. Ct. 1956); *Englert v. Durst*, 37 LRRM 2306 (N.Y. S. Ct. 1955); *Autrino v. Sexton*, 36 LRRM 2129 (N.Y. S. Ct. 1955); *Skinner v. Carpenters Union*, 36 LRRM 2468 (Colo. Dist. Ct. 1955); *Simmons v. Retail Clerks Assn.*, 5 Ill. App. 2d 429, 125 N.E. 2d 700, 36 LRRM 2144 (1955); *Wilkes Sportswear, Inc. v. Ladies' Garment Workers*, 380 Pa. 164, 110 A. 2d 418, 35 LRRM 2298 (1955); *Amore v. Building Trades Council*, 39 LRRM 2153 (Pa. Common Pleas, 1956); *Lindsey Tavern v. Restaurant Employees*, 125 A. 2d 207, 38 LRRM 2770 (R.I. S. Ct. 1956).

the law is thus summed up by the Missouri Supreme Court in *Bellerive Country Club v. McVey*, supra (36 LRRM at 2289):

"We have examined the many cases and other authorities cited by the parties. . . . We should be less than frank were we to profess to understand all of them or were we to contend that they are readily, if at all, reconcilable."

What is clear is that many state courts no longer feel that organizational picketing enjoys any constitutional protection. They feel that they are quite free to enjoin it if otherwise disposed so to do.

### III

#### The Constitutional Principles Governing Organizational Picketing

We think it is clear (1) that this Court has never meant to withdraw all constitutional protection from organizational picketing, and (2) that many state courts have nevertheless taken this Court's decisions in *Hughes* and its companion cases as meaning just that, either in theory or in practice. We therefore respectfully suggest that the Court may wish to clarify some of the things that were said in those decisions.

1. A phrase employed in the *Hughes* case—"the compulsive features inherent in picketing"—has been taken by some to mean that picketing is not a legitimate means of communication, but inherently coercive. Thus some state courts have relied on the supposed "coercive" aspect of picketing to support bans on all organizational picketing.

~~We~~ We do not, of course, believe that the Court intended that any such far reaching inferences be drawn from its

probably casual employment of this phrase in the *Hughes* opinion.

2. It is no doubt true, as far as this Court is concerned, that the validity of a state substantive policy does not in general depend on whether it is judicially or legislatively articulated. We suggest, however, that where the question is of balancing the interest of a State in implementing a substantive policy against the policy of the federal Constitution to preserve freedom of speech, a policy deliberately declared by a state legislature should be entitled to greater weight than a policy judicially enunciated.

Further, in both the *Hughes* and *Hanke* cases the asserted state policy to which this Court accorded such respect was first discerned by the state courts in those very cases—and for the purpose of banning picketing. As suggested by the Court's final sentence in the *Hughes* opinion, the evil perceived by the California courts was "picketing to bring about proportional hiring" and not proportional hiring itself. Similarly in the *Hanke* case the evil discerned by the Washington courts was picketing to induce self-employed persons to comply with union standards as to night and holiday closing, rather than such closing itself. If state courts are permitted to ban picketing on the basis of a state policy which exists for no purpose other than banning picketing, the right to picket has, as a practical matter, lost much of its constitutional sanction.

3. The Court has, quite understandably, tended to shy away from laying down general rules, and to assert that in each case the interest of the state in effectuating its substantive policy must be balanced against the restriction on free communication involved in banning picketing. Typical of this approach is the assertion in the *Hughes* case that (339 U.S. at 469, 70 S. Ct. at 723) "we do not go beyond

the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts." The fact nevertheless remains that in the absence of easily understood general principles uniformly applied by this Court, the state equity trial courts, with their traditional concern for the protection of property, and their tendency to issue temporary injunctions pending final decision, normally resolve all doubtful issues against picketing.

4. The State courts are exercising an unfettered discretion to infer an unlawful union purpose from the bare fact of picketing. We do not think that this practice is sanctioned by any decision or even language of this Court.

Where, as in the *Giboney* or *Gazzam* cases, the union is picketing in support of a specific demand with which the employer could not lawfully comply under a valid state law, we think no exception can be taken to the conclusion that the picketing may constitutionally be forbidden. The right of free speech is always subject to the limitation that speech may not seek to induce illegal conduct, and of course we do not suggest that picketing is entitled to greater protection than other forms of speech. The secondary boycott provisions of the Taft-Hartley Act, for example, are written on the assumption that picketing which seeks to induce conduct of the sorts prohibited by those sections may constitutionally be forbidden,<sup>11</sup> and we do not quarrel with that assumption, though we disagree with the congressional judgment as to what types of conduct should be forbidden.

If, however, picketing is to be banned because for an illegal purpose, we submit that this Court should require (1) that the trial court specifically find that the picketing was for a specific illegal purpose, and (2) that the

<sup>11</sup> See *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694, 705, 71 S. Ct. 954, 960.

finding be supported by the clear weight of the evidence, and not simply by an inference drawn by the trial courts, or, as here, the appellate state court.

There are any number of inferences as to the union's purpose which might conceivably be drawn simply from the bare fact that it is picketing an unorganized plant. Among them are:

1. That the union is appealing to the employees in the plant to join the union.
2. That the union is appealing to the employer—
  - a. To make lawful suggestions to its employees with respect to joining the union. Such statements might run the gamut from a bare statement by the employer that it would not fire the employees for joining a union to a statement that it believed in unions and thought that the employees should join. Under the Constitution and the National Labor Relations Act, (Section 8(c)) an employer has broad rights to express its views on unionism to its employees, so long as it does not engage in threats of reprisal or promises of benefit; or
  - b. To coerce the employees to join the union; or
  - c. To recognize the union if a majority of employees join; or
  - d. To recognize the union regardless of the wishes of the employees.
3. That the union is appealing to the general public, or to other employers—
  - a. To intervene on its behalf with the picketed employer; or
  - b. To refuse to deal with the picketed employer.

- 4: That the union is appealing to employees of other employers, such as drivers of delivery trucks—
  - a. That they urge the employees of the picketed plant to join a union; or
  - b. That they refuse to make deliveries.

The list of possible inferences as to the union's purpose might be added to almost indefinitely. Cf. *Thornhill v. Alabama*, 310 U.S. 88, 101; 60 S. Ct. 736, 743, footnote 18. Some of these inferred purposes are lawful, some unlawful. If the state courts are given carte blanche to choose among them, not on the basis of evidence in the record but simply according to their own predilections, the vital constitutional right to organize through peaceful picketing will continue to be denied, and in the very jurisdictions where workers and unions have most need of it.

## CONCLUSION

For the reasons stated, we respectfully submit that the decision of the Supreme Court of Wisconsin should be reversed.

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Office - Supreme Court, U.S.

**FILED**

JUL 11 1957

JOHN T. FEY, Clerk

IN THE

**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1956.

No. 79.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL  
695, A. F. L.; INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 139, A. F. L.; and BUILDING & CON-  
STRUCTION LABORERS UNION, LOCAL 392, A. F. L.,

Petitioners,

vs.

VOGT, INC.,  
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin.

**PETITION FOR REHEARING.**

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**PETITION FOR REHEARING.**

Now come Petitioners, International Brotherhood of Teamsters, Local 695, A. F. L.; International Union of Operating Engineers, Local 139, A. F. L.; and Building & Construction Laborers Union, Local 392, A. F. L., and respectfully move this Honorable Court to grant a rehearing in the above captioned case, in which the decision was entered on June 17th, 1957. In support of this Petition for Rehearing the Petitioners show to this Honorable Court as follows:

**I. The Majority Opinion in Restating the Basic Principles Controlling a Claim of Constitutional Free Speech as Applied to Peaceful Picketing Failed to Give Adequate Consideration to the Sole Question Presented by the Instant Case.**

Virtually the entire majority opinion in this case was devoted to a summary of prior decisions in which the question of protected free speech was raised in the context of picketing. The conclusion reached by the majority was that this "series of cases" gives "wide discretion to a state in the formulation of domestic policy . . ." (Slip Op. p. 10). However, at no point in the state courts did the Petitioners challenge the general proposition that a state has, under the decisions of this Court, "wide discretion" in the establishment of domestic policy insofar as it relates to peaceful picketing. And before this Court the Petitioners expressly eschewed any challenge "to legislative power . . ." (Pet. Br. p. 16).

The only question raised by the Petitioners in the state courts, and the sole issue presented in the proceedings before this Court, was whether the established facts, and the inferences reasonably drawn therefrom, permitted a finding that the picketing was for the unlawful purpose of compelling Vogt to interfere with his employees' right of self-organization. But, only one sentence in the majority opinion is devoted to this basic question, the Court concluding that "the circumstances set forth in the opinion of the Wisconsin Supreme Court afford a rational basis for the inference it drew concerning the purpose of the picketing" (Slip Op. p. 11).

We do not believe that this Court is prepared to hold, as did the Wisconsin Supreme Court, that the bare fact of solicitation justifies an inference of unlawful purpose. Nor can we believe that this Court is willing to sanction a finding that the public road was lightly travelled, for there is absolutely no evidence in the record to support

such a finding. But even assuming that such a fact were in the record, we do not believe that this Court is willing to hold that an inference of unlawful objective may be drawn from the limited size of the speaker's audience. These are the questions which were presented by the petition for certiorari and briefs in this case. No question of judicial or legislative power to formulate domestic policy was involved. Hence, the case is quite unlike **Pappas v. Stacey**, 151 Me. 36, 116 A. 2d 497.

Rather than being akin to the **Stacey** case, this cause presents questions like those presented in **Schware v. Board of Bar Examiners**, 1 L. Ed. 2d 796; and **Konigsberg v. State Bar of California**, 1 L. Ed. 2d 810. In both of those cases, this Court carefully examined and weighed the factual components of the record and re-evaluated the inferences which might be reasonably drawn from those established facts. The Court did not satisfy itself by a mere conclusionary statement that the inferences drawn were or were not reasonable. Cases presenting claims under the Bill of Rights, by their very nature, require such re-evaluations.

## II. The Total Lack of Evidence Concerning the Movement of Traffic on the Public Road Upon Which the Picketing Occurred Coupled With the Subsequent Declaration by the Wisconsin Supreme Court That Such Facts Cannot Be Judicially Noticed Afford an Independent Ground Supporting This Motion for Rehearing.

The Wisconsin Supreme Court's finding of unlawful purpose was in large part based upon the assumption that the public road upon which the picketing occurred was lightly traveled (R. 36). As Petitioners pointed out (Pet. Br. p. 21n) and as Respondent's Counsel conceded in oral argument before this Court, there is no evidence in the record to support this finding. Subsequent to the submis-

sion of briefs in this case, the Wisconsin Supreme Court expressly held that such facts cannot be judicially noticed. **Jeffers v. Peoria-Rockford Bus Co.**, 274 Wis. 594, 80 N. W. 2d 785, 788. Hence, the Wisconsin Supreme Court's finding of unlawful purpose was bottomed upon a fact not in the record and of the kind which cannot be judicially noticed. The apparent failure of this Court to consider the total lack of evidence supporting the conclusion that the road was lightly traveled, coupled with the subsequent declaration by the Wisconsin Supreme Court that such facts may not be judicially noticed, afford an independent ground supporting this motion.

Both from the standpoint of a realistic evaluation of the facts and circumstances of this particular case and from the standpoint of affording a workable guide to be employed in the adjudication of similar cases we respectfully request that the Court grant a rehearing in order to afford an opportunity for a detailed reconsideration of the basis for the inferences drawn by the Wisconsin Supreme Court.

### **CONCLUSION.**

For the foregoing reasons it is respectfully submitted that this Petition for Rehearing should be granted, and that the judgment of the Supreme Court of the State of Wisconsin should be reversed.

Respectfully submitted,

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Counsel for Petitioners.

This Petition for Rehearing is presented in good faith, and not for the purpose of delay.

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David Previant.